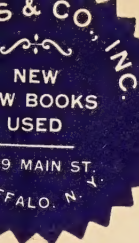


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FOREWORD

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CANAL ZONE SUPREME COURT REPORTS

Volume 2

October, 1908 to June, 1914

THEODORE C. HINCKLEY AND
STEVENS GANSON
Reporters

Panama Canal Press
Mount Hope, C. Z.
1915

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DENNIS & CO., INC.

Buffalo, N. Y.

May, 1941

Registered Copy No. 26

CANAL ZONE SUPREME COURT REPORTS

VOLUME II.

CASES ADJUDGED
IN THE
SUPREME COURT OF THE CANAL ZONE

FROM

October, 1908 to June, 1914

THEODORE C. HINCKLEY and STEVEN3 GANSON
Reporters

PREFACE.

The Supreme Court of the Canal Zone was organized pursuant to the provisions of Act No. 1, of the Isthmian Canal Commission, enacted August 16, 1904.

The court ceased to exist on July 1, 1914, by reason of the Executive Order of the President of the United States of America, dated March 12, 1914, putting into operation the Act of Congress of August 24, 1912.

The two volumes printed in this book contain all of the opinions rendered by the Supreme Court of the Canal Zone. The second volume was prepared and this book compiled by the undersigned at the request and under the direction of the Justices of the Supreme Court.

THEODORE C. HINCKLEY,
STEVENS GANSON,
Of the Canal Zone Bar.

JUSTICES
OF THE
SUPREME COURT OF THE CANAL ZONE

DURING THE TIME OF THESE REPORTS.

HEZEKIAH A. GUDGER, CHIEF JUSTICE.
LORIN C. COLLINS, ASSOCIATE JUSTICE.
WESLEY M. OWEN, ASSOCIATE JUSTICE.
THOMAS E. BROWN, ASSOCIATE JUSTICE.
WILLIAM H. JACKSON, ASSOCIATE JUSTICE.
ELBERT M. GOOLSBY, *Clerk.*

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CASES ADJUDGED
IN THE
SUPREME COURT OF THE CANAL ZONE.

CANAL ZONE *versus* PEREZ and GUZMAN.

No. 46. Argued February 20, 1909. Decided April 1, 1909.

JURISDICTION. COURT MAY HAVE IN CERTAIN CRIMINAL CASES WITHOUT ISSUING BENCH WARRANT.

The Laws of the Canal Zone permit the Prosecuting Attorney to subpoena witnesses, examine them under oath and file informations in the Circuit Courts without any preliminary proceedings being had before the District Courts. HELD, even though there had been no proceedings before the District Court, the Prosecuting Attorney may file an information before the Circuit Court, and if the accused, who is present in court and pleads generally to such information and raises no question as to the manner in which he came into court, and remains in the custody of the court, the issuing of a bench warrant is not necessary to give jurisdiction, the accused being already in custodia legis.

DISPUTED QUESTIONS OF FACT IN AGREED STATEMENT OF CASE ON APPEAL.

It is a familiar rule that in disputed questions of fact the appellate court will decline to reverse the trial court unless all of the evidence heard at the trial is presented in the record and submitted.

Appeal by defendants from the Circuit Court of the Second Judicial Circuit, Canal Zone; Hon. F. Mutis Duran, Judge.

The facts appear in the opinion.

Sam B. Dannis, for appellant. *G. M. Shontz*, for the Canal Zone.

LORIN C. COLLINS, J. The case-made filed in this cause, showed that some coffee was taken from the possession of the Pacific Steam Navigation Company at La Boca, by a person or persons unknown. That said coffee was in the hands of the Pacific Steam Navigation Company as a common carrier. That

afterwards a portion of it was found in the house of Nicasio Perez, one of the defendants, in the city of Panama. That at the time the coffee was there found, Alberto Guzman was present and was engaged in resacking the coffee.

The record shows that an affidavit was made before the District Judge of the District of Ancon on December 2, 1907, on which a warrant for arrest was issued on the 5th day of December, 1907, and was returned with the following endorsement thereon:

Canal Zone, District of Ancon, S. S. By virtue of the within warrant I have this day taken into custody Manuel Heredia, Alberto Guzman, and Nicasio Perez, the defendants named therein, and have delivered them before the District Judge of Ancon as I am commanded. Dated this 18th day of August, A. D. 1908.

A trial was had in the District Court on August 21, 1908, and the defendants were held to bail to the Circuit Court, August 22, 1908, at \$500 each.

On August 22, the Prosecuting Attorney of the Canal Zone filed an information in the Circuit Court charging the larceny on the 6th day of August, 1907, of fifty bags of coffee at the value of \$1,000, owners unknown, but in the possession and under the control of the Pacific Steam Navigation Company, and on the same day defendants being duly arraigned and represented by counsel, plead not guilty to the information.

The defendants were duly tried and the court, on the 28th day of September, 1908, found the defendants guilty as charged in the information.

A motion for a new trial was made and overruled, to which the defendants duly excepted and on the 3d day of October, 1908, the defendants were sentenced to be confined for one year in the penitentiary of the Canal Zone.

A motion was duly made in arrest of judgment and overruled to which the defendants excepted.

On the record so made the case was brought to this court on appeal.

There are two grounds of reversal urged by the counsel for the defendants. The first being that as the complaint in the District Court charged the defendants with the commission of a crime between the 8th and 15th days of April, 1907, and as the defendants were bound over to the Circuit Court to answer that charge; the prosecuting attorney having filed an information against them for a crime committed on the 6th day of August, 1907, and

no bench warrant having been issued, that the court was without jurisdiction in the case.

The laws of the Canal Zone permit the prosecuting attorney to subpoena witnesses, examine them under oath and file informations in the Circuit Courts without any preliminary proceedings being had before the District Court. This power and right seems to be nowhere abridged, therefore, had there been no proceedings before the District Court of Ancon, the question arises as to whether or not, when the Prosecuting Attorney files an information in the Circuit Court and the accused is present in court and pleads to the information and remains in the custody of the court, the issuance of a bench warrant is necessary to jurisdiction:

If the accused, when indicted, is in custody or if he appears in court and submits to the jurisdiction he can not object that no process had issued to arrest him. 12 Cyc, Page 343A, and cases there cited.

The defendants should, had they desired to raise a jurisdictional question as to the manner of their being in court, have raised the question at the time of their arraignment; their plea of not guilty was not withdrawn or the question raised until after the trial had been entered upon and they had introduced testimony for the defense.

The following citations sustain this conclusion:

In order that a court may try and punish for an offense, it is not only necessary that it shall be a legally constituted court and have jurisdiction of the offense, but it is also necessary that it shall have jurisdiction of the person of the defendant.

Irregularities in obtaining jurisdiction of the person of the defendant may be waived by him and they are waived if he pleads to the indictment and raises no objection. (12 Cyc., 220.)

Jurisdiction of the person of the defendant may be conferred by consent or waiver. (Ibid., 222.)

The objection that a court has no jurisdiction of the person of the accused may be waived. It must be taken when he is arraigned and is waived if he pleads or goes to trial.

The objection that the court has no jurisdiction of the person of the defendant whether by reason of some irregularity in the proceedings, or for other reasons is waived by defendant by pleading not guilty and going to trial or by pleading guilty. (Ibid., 228.)

Where one is arrested without a warrant and brought before a magistrate, the charges against him may be investigated and he may be committed in default of bail without the issuance of a warrant or he may be tried without the issuance of a warrant unless a warrant and a sworn complaint is required by statute to confer jurisdiction. (Ibid., 297.)

A general appearance by the accused and his plea of "not guilty" are a waiver of all objections to matters of form in the warrant. Such objections should be made by plea in abatement before the court in which the warrant is returnable. (*Ibid.*, 303.)

We are therefore, of the opinion that when an information is filed and a defendant is arraigned and pleads to the information and raises no question as to the manner in which he came into court, that it is not necessary for the Circuit Court to issue a bench warrant, the accused being already in *custodia legis*.

The second point raised by the accused is as to their guilt. The records contains a "case-made" or agreed statement which does not purport to contain all of the evidence. There is no statement or certificate that there was not other evidence heard by the court and that the evidence submitted was all of the evidence in the case. It is a familiar rule that in disputed questions of fact the Appellate Court will decline to reverse the trial court unless all of the evidence heard at the trial is preserved in the record and submitted. In support of this view we cite the following authorities:

Where the error sought to be remedied appears upon the record, the party aggrieved may avail himself of it on appeal or writ of error without bill of exceptions, case, statement, or other statutory remedy.

But rulings and decisions of the lower court, the correctness of which can not be determined from the record proper, must be made a part of the transcript; by bill of exceptions, case, statement of facts or other mode prescribed by statute in order to their review by the Appellate Court. (2 Cyc. 1076.)

Rulings, the correctness of which can not be determined from the record proper, must be made a part of the record by bill of exceptions, a statement of facts, or a similar method provided by statute. (12 Cyc. 845.)

Judges' certificate should state that the bill of exceptions specifies all of the record material to a clear understanding of the errors complained of and where this is not done the appeal may be dismissed. (12 Cyc. 850.)

In some jurisdictions alleged errors or irregularities not disclosed by the record are brought to the attention of the Appellate Court by a "case-made" or statement of facts.

A case-made or statement of facts should contain enough of the proceedings to enable the Appellate Court to intelligently review the errors complained of. (12 Cyc. 855.)

Where it is error of law, it is not necessary that the record should certify that all material evidence is included, but where the error complained of is of fact, it should affirmatively appear that the statement includes all evidence bearing on the disputed fact.

Therefore, this court can not assume that the evidence as set out in the statement was all of the evidence in the case and that there was not other evidence submitted to the trial court.

This being the case the court can not consider the question of fact—that is to say, the guilt of the accused.

There being no reversible error apparent upon the record the case will be affirmed.

JUSTICES GUDGER and OWEN concurred.

Affirmed.

HANSON *versus* SUCCARI.

No. 47. Argued February 20, 1909. Decided March 25, 1909.

CONTINUANCE. ABUSE OF DISCRETION.

Refusal by the trial judge to grant a continuance is discretionary, and there has been no abuse of such discretion when a witness expected to be called by one of the parties, although within the jurisdiction of the court had not been subpoenaed to appear on the day set for trial.

Appeal by defendant from the Circuit Court of the Second Judicial Circuit, Canal Zone; Hon. Lorin C. Collins, Judge.

Sam B. Dannis, for appellant. *P. P. Hillerman*, for appellee.

H. A. GUDGER, C. J. It appears from the record in this case that the trial was set by the presiding judge with the consent of all the parties for hearing on the 16th day of October, 1908. On that day the case was regularly docketed and reached for trial in the afternoon, when the plaintiff announced himself ready for trial and the defendant moved for a continuance, stating as a ground for the same that there was a misunderstanding between the attorney for the defendant and the defendant as to the day set for trial, and for that reason the principal witness relied upon by the defendant had not been notified to be present in court.

It also appears that on said date defendant was present and in court during the morning session; that he lived in the town of Empire within a short distance of the court room; and that the witness he expected to use in his behalf was also in Empire on that day, but not at the courthouse.

The only question involved in the appeal is the exercise of discretion on the part of the trial judge in refusing to continue the

case at the instance of the defendant. In exercising this discretion under the circumstances named above we do not feel that there is an abuse of discretion, and therefore the matter is not reversible by this court.

The judgment of the court below is affirmed. Let this be certified.

JUSTICE OWEN concurred.

Affirmed.

MACDOUGAL *versus* McCLEAN, *et al.*

No. 48. Submitted February 9, 1909. Decided March 25, 1909.

MALICIOUS PROSECUTION.

In order to recover in an action for malicious prosecution, it is necessary to prove that the defendant was the prosecutor or that he instigated the criminal proceedings; that the charge preferred was unfounded; that it was made without reasonable or probable cause; that it was actuated by malice; that the defendant was acquitted, or that the proceedings against him were dismissed.

MALICE AND PROBABLE CAUSE.

Malice alone is not sufficient to sustain an action of malicious prosecution. Want of reasonable and probable cause is as much an element as the evil motive.

ADVICE OF COUNSEL.

In order to successfully defend an action for malicious prosecution, such defense being based upon the fact that defendant has acted upon the advice of counsel, it is necessary that defendant should have made a full, fair, and honest statement of all the material circumstances of the supposed guilt which were within his knowledge, or which he could have learned by the exercise of ordinary care.

DAMAGES.

Monetary compensation may be recovered by way of damage for injury sustained by reason of malicious prosecution.

Appeal by defendant from the Circuit Court of the Second Judicial Circuit, Canal Zone; Hon. Lorin C. Collins, Judge.

The facts appear in the opinion.

Carrington and Todd for appellants. *Oscar Teran* for appellee.

WESLEY M. OWEN, J. This is an appeal from a judgment of the Circuit Court rendered in the Second Judicial Circuit of the

Canal Zone for six hundred dollars (\$600), United States currency, and costs of suit secured by E. J. MacDougal on October 6, 1908, against D. T. McClean.

The action was originally instituted in the court below by appellee against D. T. McClean and I. L. Maduro for malicious prosecution. The complaint set out the cause of action in nine different paragraphs. Issue being joined, trial was had resulting in a judgment finding I. L. Maduro "not guilty" while D. T. McClean was "found guilty" and judgment was rendered against him as above stated.

It appears from the evidence that appellee has resided in the Canal Zone about three years. That he had twice been in the employ of appellants, who were the proprietors of the Gorgona Aerated Water Company; on the first occasion appellee remaining in such employ about nine months. That in January, 1908, he was reengaged as manager of the factory at a salary of \$100 gold per month in addition to the use of one free room, and also allowed 10 per cent commission on sales. That such employment was without term. That as manager it devolved upon appellee to pay off hands, take general charge of said business, keep the books, etc. That from time to time appellee paid himself, charging his account in the books of the firm and which books were not only open to but inspected by the appellants whenever they felt so disposed.

From the record it appears everything ran along apparently satisfactorily until in May, when appellants suggested a reduction in the salary of appellee. Statements and letters were exchanged wherein appellants contended salary paid was in excess of what the profits of the business justified, while appellee maintained he could not consistently remain in the employ of appellants at any reduced salary.

On the evening of May 14, 1908; when appellee maintains one month had expired from date first notice of change or reduction in salary had expired, he closed his work, balanced up his accounts, including his own, and paying himself \$1,261 Panamanian currency, the amount his account disclosed as due him for salary and commissions, and penning his employers a letter, he suggested his withdrawal from their employ, and calling their attention to the fact that he attached therewith a statement of his personal account wherein he had paid himself the above amount, and that he desired the relation that had heretofore existed as employer and employee to be discontinued. Continuing, the letter stated

that appellee would remain at the California Hotel in Gorgona for a period of ten days, where appellants could address him if they desired any information concerning the business or the discontinuing of said relations.

From the evidence it appears that after having written the above letter appellee delivered the same in person and read it to appellant, McClean. On receipt of such letter and after having heard it read McClean said "So you have paid yourself?" to which answer was made "Yes, as usual." Then McClean replied "This is a matter for the courts to decide." On the following morning, May 15, at seven o'clock, appellee received a letter from appellant McClean as follows:

GORGONA, 15 May, 1908.

Mr. MacDougal. I beg to say your conduct has not proved you to be what I always thought you were. You have proved yourself a rogue.

I now beg to inform you that if monies are not returned to safe by 11 a. m., I shall issue a warrant for your apprehension and have you tried.

You can take what steps you like after.

Your obd. servt.,
(Sgd.) D. T. McLEAN.

On the same day McLean filed a complaint with the judge of the District Court of Gorgona, Canal Zone, charging appellee with "*unlawfully, wilfully, and fraudulently appropriating to his own use the sum of \$600 gold,*" the property of the Gorgona Aerated Water Company, a copartnership consisting of D. T. McLean and I. L. Maduro. Warrant was immediately issued on said complaint and appellee apprehended and taken to the police station where he remained for one hour and a half before being conducted to the municipal court, where he gave bond in the sum of \$1,000 United States currency for his appearance on the 20th day of May, 1908.

On this latter date the testimony of appellants was taken, the crime of embezzlement charged against appellee, and by action of the district judge appellee was held to appear in the Circuit Court of the Second Judicial Circuit of the Canal Zone.

At a regular session of the latter court on July 14, 1908, appellee was discharged and the suit against him dismissed.

On July 21, 1908, the proceeding in question was instituted for malicious prosecution, from which trial was had and disposition made as hereinbefore stated.

From appellants bill of exceptions three errors are assigned on which appeal to this court is prosecuted, namely, (1) because the evidence is insufficient to justify the judgment. (2) because

the judgment is contrary to the law. (3) because excessive damages have been awarded.

The law is well settled that to support an action for malicious criminal prosecution the complainant must prove: The prosecution, and that the defendant himself was the prosecutor, or that he instigated its commencement. He must prove that the charge preferred against him was unfounded and that it was made without reasonable or probable cause, and was actuated by malice. That there was an acquittal or successful termination of the proceedings in his favor. Proof of these several facts is indispensable to support the complaint. This was the early requirement of the law in actions of this nature and the same rule has not been changed. (26 Cyc., page 6, *Morris vs. Corson*, 7 Cow. 281.)

Applying such principles to the several phases of proof presented in divers late cases we find the courts to have enlarged or rather explained many of the requirements to a successful prosecution for malicious prosecution. From a deduction of these decisions it is clear that every person that puts the criminal law in force maliciously and without any reasonable or probable cause, commits a wrongful act, and if the accused is thereby prejudiced either in his person or property, the injury and loss so sustained constitute the proper foundations of an action to recover compensation.

Malice alone is not sufficient to sustain an action. Want of reasonable and probable cause is as much an element as the evil motive. Either of these allegations may be proved by circumstances, as they usually are, and it is unquestionably true that want of probable cause is evidence of malice, although not the same thing. It is apparent that proof must appear, however, either from direct testimony or from the circumstances in and surrounding the case, of both malice and want of reasonable and probable cause. Nothing will meet the exigencies of the case so far as respects the allegation that probable cause was wanting, except proof of the fact, and the *onus probandi* is upon the plaintiff. (*Purcell vs. McNamara*, 9 East., 361. *Williams vs. Taylor*, 6th Bing., 184. *Johnson vs. Sutton*, 1 Tenn., 544.)

Applying these uniform and well-established principles to the case at bar, we have studiously read and carefully observed the manner of trial and each ruling of the court as shown from the extensive record in this case, and can perceive no wrong, much less reversible error, either from the manner of proof or the admission of evidence in the prosecution and trial of said cause.

Having reached this conclusion the remaining proposition to be discussed and which commands our attention for the reason that appellants in their "brief and argument" say without waiving any rights, etc., "we respectfully desire to securely plant our main contention on the assigned error *because the judgment is contrary to the law.*"

From a careful study of the record it appears that appellants notified appellee of a desire to make a reduction in salary. In the absence of consent on the part of contracting parties appellants could not arbitrarily bind appellee. The proof is that appellee would not consent, but following his regular custom of which appellants had notice, he paid himself, and in the letter above referred to gave notice of the termination of the former relation that had existed between the litigants. In the early morning following the receipt of such letter appellant, McClean, made reply in a communication which we have heretofore set out in full, and the phraseology of which we consider manifestly improper, reprehensible and uncalled for, inasmuch as so mutual a relation had previously existed. On the same day McClean files his complaint in the District Court charging appellee as above set forth. Appellee was arrested, and on examination following arrest appellants testified charging the appellee in language, the tenor of which is in keeping with the complaint McClean had filed.

Referring again to the essential elements in an adjudication of this nature, the arrest and acquittal of appellee must be conceded. The remaining elements to be discussed are want of reasonable and probable cause and the evil motive prompting the same.

The only excuse offered by appellants for instituting parent proceedings, or the evidence offered by them as a negative of the presence of malice or want of probable cause for such proceeding, was the consultation and advice of counsel, and on which they maintained they acted. We understand the law to be uniform, that if reputable counsel is consulted and a full and complete statement of all facts given, and on the advice of such counsel alone, the criminal action is predicated, the charge of malice or want of probable cause must fall. In the record before us we find this nefarious letter written and delivered at 7 a. m., long before counsel has been consulted, and wherein appellant, McClean, states among other things "I shall issue a warrant, etc.," It is not apparent that the decision to arrest appellee was conceived and decided upon even before this letter was directed—and long before counsel was consulted.

Then again, it is mandatory that counsel shall be given all the facts—nothing must be omitted. Here it appears from the record the very bone of contention was the accounting or pending settlement between the litigants. The evidence of Mr. Carrington is that nothing was said to him by Mr. McClean about an accounting or the settlement pending between the parties.

The legal ability of able counsel consulted is a matter of pride in this court, and it is but a fair inference that had he been informed of the accounting or settlement pending between the parties, a civil remedy would have been advised and an amicable adjudication resulted.

Justice Walker in *Roy vs. Goings*, 112 Ill., 655, has well said:

The general rule, long and uniformly recognized, requires a person to make a full, fair, and honest statement of all the material circumstances of the supposed guilt which are within his knowledge or which he could learn by ordinary care. To protect himself he must make a full statement of all material fact. He will not be protected if he makes a garbled or untrue statement. Human liberty is too sacred to be recklessly invaded to gratify malice or for the advancement of personal interest.

Now taking into consideration all the circumstances as disclosed by the record, we are manifestly impressed with the conclusion that the trial court was justified in finding that there was want of reasonable and probable cause for the instituting of the criminal action by appellants against appellee. That to sign and dispatch the letter already commented upon, followed in such rapidity by the execution under oath of the complaint made, could have been prompted by nothing less than an evil motive. The trial judge had the opportunity of hearing and seeing the witnesses testify, and knowing the interest they manifested. This advanced position has been well recognized in passing on the weight of testimony by an Appellate Court.

Recognizing this, and not being able to say the judgment is contrary to law or manifestly against the weight of the evidence, we are of the opinion it should be affirmed.

So little has been said in brief and argument on the third assignment of error, namely, excessive damages, that we feel but little need be said. Appellee was a married man in the prime of life, depending entirely upon his labor for subsistence. He was arrested on May 15, 1908, and not discharged until July 14 of the same year. The stigma following such experience can not easily be removed. It is problematical as to the damage being adequately measured with paltry dollars; however, in this instance

we find no cause from the record to diminish, but ample and abundant proof to sustain, the findings of the trial court in the judgment of six hundred dollars United States currency as damages.

The judgment of the lower court is affirmed.

The CHIEF JUSTICE concurred.

Affirmed.

ACEBO *versus* GARAVEL.

No. 49. Argued February 20, 1909—Decided April 12, 1909.

AMENDMENT TO PLEADINGS.

Any pleading may be amended at any stage of the action, in the Circuit or Supreme Court in the furtherance of justice.

GOOD FAITH.

One who enjoys the civil fruits of real property with actual or constructive notice that both title to the property and to such fruits is in another, can not be considered a possessor in good faith.

Appeal by defendant from the Circuit Court of the Third Judicial Circuit of the Canal Zone; Hon. Lorin C. Collins, Judge.

The facts appear in the opinion.

W. H. Carrington for appellant. *Oscar Teran* for appellee.

H. A. GUDGER, C. J. This is an appeal from the order and judgment of the judge of the Third Judicial Circuit. The case was tried August 27, 1908, and all the issues were found in favor of the plaintiff, and judgment entered charging the defendant with rents and profits during the time he was in possession of the property. From this judgment the defendant excepted and appealed.

Before the case was set for trial in the court below the plaintiff moved to amend his complaint. This motion was allowed by the court and excepted to by the defendant.

The first question that demands attention is the power of the court to permit parties to amend their pleadings, either before or after trial has begun. Section 103 on page 25 of the Code of Civil Procedure of the Canal Zone settles this question. It reads as follows:

The court shall, in furtherance of justice, and on such terms, if any, as may be proper, allow a party to amend any pleading or proceeding and at any stage of the action, in either Circuit Court or the Supreme Court, by adding or strik-

ing out the name of any party, either plaintiff or defendant, or by correcting a mistake in the name of a party, or a mistaken or inadequate allegation or description in any other respect, so that the actual merits of the controversy may speedily be determined, without regard to technicalities, and in the most expeditious and inexpensive manner. The court may also, upon like terms, allow an answer or other pleading to be made after the time limited by the rules of the court for filing the same. Orders of the court upon the matters provided in this section shall be made upon motion filed in court, and after notice to the adverse party, and an opportunity to be heard.

The second assignment of error raises the question of title as well as the good faith of the defendant in possession. It is conclusively shown and admitted that both the parties to this action claim title by and through one Noel André. As each recognized that the title to the property was in André during the year 1886, and up to the time he professed to transfer the same to the plaintiff herein, it is unnecessary to consider anything in regard to title back of that established source.

At the trial the plaintiff offered in evidence two separate deeds, duly proved and properly registered, the one from Noel André to Bertrand and Ousset, dated the 14th day of August, 1886, and the other from Bertrand and Ousset to Acebo, the plaintiff herein, dated the 8th day of October, 1887. Nothing else appearing, this gives to Acebo a perfect record title to the property.

The appellant contends that Noel André had no power to convey the property at the date of the first deed mentioned above, as he was at that time a bankrupt, so declared by the Court of Commerce of the city of Panama.

The record introduced by the appellant for the purpose of showing this fact is so vague and incomplete that the court can not conclude that it successfully establishes the contention of the appellant's attorney.

The appellant further contends that, even admitting that the appellee had a good title to the property, under the Civil Code of Panama, in force in the Canal Zone, he, the appellant, is not chargeable with the "civil fruits" during his occupancy of the house, provided he was a possessor in "good faith."

"Good faith," as defined by the Code, is:

The consciousness of having acquired the ownership of a thing by legal means, exempt of fraud and any defect.

The Code also provides that:

Good faith presumes the idea of having received a thing of one who had the power to alienate it. and that there was no fraud or other vice in the act or contract.

The appellant in this case had actual notice of the deed made by André to Bertrand and Ousset, as the record clearly shows. He had constructive notice of the deed made by Bertrand and Ousset to Acebo because it was duly registered, and this act within itself is notice not only to him but to all the world.

In addition to this it appears that Garavel was engaged in an energetic effort from the year 1886 until 1889 to get hold of this property. The appellee, Acebo, was in possession in person from October 8, 1887, until some time in 1893, when he left for Cuba, leaving in charge one Morean as his caretaker. It is reasonable to suppose that Garavel knew of the possession of Acebo and his caretaker. He was the prime mover in the litigation in the courts of Panama and yet no notice was given to parties known to claim an interest in the subject matter before the court, and no public advertisement was made.

Under such circumstances it does not appear that the appellant is entitled to be considered a tenant in good faith.

The judgment of the court below is affirmed, and the circuit judge will take such action in regard to execution and ascertaining rents from the date of the judgment in the circuit court to the date upon which possession shall be delivered to the appellee as may be authorized by law. Let this be certified.

JUSTICE OWEN concurred.

Affirmed.

GOVERNMENT OF THE CANAL ZONE *ex rel. versus* YOUNG

No. 50. Petition filed February 15, 1909. Decided April 12, 1909.

ATTORNEY. DISBARMENT.

An attorney who makes a wilful, malicious, and false attack upon a member of the Canal Zone judiciary or who fraudulently appropriates money entrusted to him by a client or who appears in court in his professional capacity in an intoxicated condition shall be subject to disbarment.

Petition and amendment thereto filed by G. M. Shontz, Prosecuting Attorney. No appearance for respondent.

The facts are as follows: That the respondent was admitted as a member of the bar of the Canal Zone on September 11, 1908; that in the issue of the "Daily Picayune," published in New Orleans, La., under date of January 9, 1909, there appeared an article signed by respondent criticizing the District Courts of the Canal Zone and alleging miscarriage of justice as a result of prejudice on the part of a District Judge; that respondent misappro-

priated money that had been entrusted to him by a client for distribution among client's creditors; that the respondent collected money for another client and did not account for the same, and that the respondent was in an intoxicated condition while appearing as an attorney to argue a cause in the District Court at Cristobal.

H. A. GUDGER, C. J. This cause coming on to be heard by the Supreme Court of the Canal Zone upon the original petition filed by G. M. Shontz, Prosecuting Attorney of the Canal Zone, on February 15, 1909, and the amendment to the original petition filed the 3d day of March, 1909;

And it appearing to the court that service of a copy of said original petition was made on the said W. Goodall Young on the 18th day of February, 1909, and of the amendment to the original petition, on the 15th day of March, 1909; that an order to show cause why his name should not be stricken from the list of attorneys-at-law practicing in the courts of the Canal Zone was made on the 15th day of February, 1909, and that a copy of said order was served on the respondent on the 18th day of February, 1909; that a further order to show cause why his name should not be stricken from the list of attorneys-at-law practicing before the courts of the Canal Zone was made on the 20th day of February, 1909, returnable March 3, 1909; that a copy of said order was served on the respondent on the 23d day of February, 1909, and that on March 3, 1909, an order was made allowing the respondent ten days in which to file an answer, and the trial of said cause was set for March 22, 1909; that on March 22, 1909, an order was made extending to the respondent ten more days in which to file an answer, and the trial of said cause was set for April 5, 1909; that on April 5, 1909, an order was made allowing the respondent until the 12th day of April, 1909, to file an answer; that on this 12th day of April, 1909, the Supreme Court of the Canal Zone convened in regular session; that the case of Government of the Canal Zone *vs.* W. Goodall Young was called in regular order, and it appearing to the court that the respondent was not present in person or by attorney, and that he has failed to file any answer to said original petition and amendment therein in accordance with the orders of this court, and has failed to show cause why the prayer of said petition and amendment thereof should not be granted or judgment rendered against him;

It is hereby ordered, adjudged, and decreed that a judgment by default be entered against the respondent in the above cause,

And it further appearing to the Court that the said W. Goodall Young was admitted to practice before the courts of the Canal Zone on the 11th day of September, 1908; that the allegations of the original petition and amendment thereof are duly sworn to by the Prosecuting Attorney, and that the said defendant by his failure to appear and answer said original petition and amendment thereto the allegations thereof are hereby taken as confessed and true, a judgment by default having been entered against this defendant; that the allegations of said original petition and amendment thereto are to the effect that the said defendant has violated his oath of office as an attorney to conduct himself in the office of a lawyer within the courts according to the best of his knowledge and discretion, with all the good fidelity both to the courts and to his clients, by making a wilful, malicious, and false attack upon the character, honor, and integrity of the judges of the Canal Zone; that the said defendant has fraudulently and feloniously appropriated to his own use funds and moneys entrusted to him as an attorney by his clients; and that he is so habitually addicted to the use of intoxicating liquors as to incapacitate him to act as an attorney, and that when appearing before a court of the Canal Zone in the exercise of his duty as an attorney he has been in an intoxicated condition.

Therefore, it is ordered, adjudged, and decreed that the name of the said W. Goodall Young be stricken from the roll of attorneys practicing before this court, with leave to the said W. Goodall Young to move to set aside this order and judgment within 30 days from the date hereof.

Done and ordered this 12th day of April, 1909.

JUSTICES OWEN and COLLINS concurred.

Order made final on May 31, 1909.

CANAL ZONE *versus* COOPER.

No. 52. Submitted August 9, 1909. Decided September 18, 1909.

WEIGHT OF EVIDENCE:

When the judgment of the trial court is shown by the record to be against the weight of the evidence, and an appeal has been properly perfected, the same will be reversed.

Appeal by defendant from the Circuit Court of the Second Judicial Circuit of the Canal Zone; Hon. Wesley M. Owen, Judge. The facts appear in the opinion.

Carrington and Todd, for appellant. *G. M. Shontz* for the Canal Zone.

LORIN C. COLLINS, J. On the morning of the 24th of November, 1908, Andrew James McFarlane arose from his couch in the village of Culebra and asked his wife for all the money she had, as he wished to go Chepo, in the interior of Panama, to purchase supplies.

Some remonstrance was made but she gave him from their mutual store, the exact sum of \$315 United States currency. Whether he had other money or not does not appear from the evidence. He then proceeded to the railroad station at Culebra, where, when engaged in conversation with one Benjamin Grant, he espied a woman with a hand sewing machine and six fowls in a basket. At this point he excused himself from Grant and walked over and gave to this woman, whose name was Mary Cooper, the appellant, a roll of money which she says contained \$63.50, and he says amounted to \$315, which Grant says was a pile of American green bills, among which he recognized a twenty-dollar bill, and asked her to keep it for him until his return from Chepo. He says, and so does Grant, that the woman asked when she should return this deposit and McFarlane said, on the 12th of December. McFarlane testifies that this woman and he were not intimate friends; that he had once, in the discharge of his duty, caused her arrest and conviction. There is no claim made that the woman solicited McFarlane and that he acted other than under his own will. He had for some years been a member of the Zone police force and had retired, or been retired therefrom.

The conversation at the station in making this bailment, does not seem to have consumed any time. It was suddenly done and might have been the result of a prior plan; but this is true, that McFarlane and his money, the eyewitness Grant, and the woman with the hand sewing machine and the basket with the six fowls arrived at the station about six or seven minutes before the train which was to take McFarlane on his way to Chepo. Why should McFarlane so suddenly have decided to make Mary Cooper the custodian of his wealth? He told his wife that he needed this

money in his business at Chepo. It does appear that he was in quite extensive business and he had been sane enough to be a policeman.

We will now examine her story. She said that for a long time McFarlane had sought her body; that his attentions had caused her to be beaten by her husband; that he gave her the money to buy a sewing machine with in consideration of sexual favors to be granted. He admits that he rode to Miraflores with her and got off and went to her house in the absence of her husband. She says that they undressed and had two acts of sexual commerce and he left her about two o'clock in the afternoon; that he came to see her the next week, and again the next week, at which times they renewed their dalliance. That he begged her to rent a house and live with him and told her that if she did not do so he would "dye her husband with blood." All this she tells as a matter of course and unblushingly and McFarlane never denies any part thereof. She further says that when she had come to Colon on her way to Jamaica, she was again solicited by McFarlane and told that if she did not give of her body to him, he would make her trouble with her husband. She admits that when threatened in Colon with exposure, she said she would return the money he had given her, but the amount to be returned is in dispute. McFarlane does not take the trouble to deny any of these things and so far as the evidence goes their relations are admittedly as Mary Cooper says they were. It must be borne in mind that McFarlane's wife testifies to giving him exactly \$315 and that he says he gave this woman \$315; that Grant was conveniently standing by and saw a large roll of American green money pass from this man to this woman; that another Zone policeman is in attendance at Colon and hears all that McFarlane says was said and which Mary Cooper denies. On this evidence Mary was found guilty of larceny as a bailee and comes to this court on appeal.

It looks as if the evidence had been carefully arranged and it must be regarded with suspicion. For a person to have been guilty of this offense, there must have been a bailment. If all the evidence in the case were rejected except McFarlane's, his story is impossible of belief. The story he narrates raises a question of the insane asylum or the penitentiary for him. The court does not believe that he made such a bailment with Mary that morning and that he has told the truth as to what passed.

Mary's version of this whole affair bears the verisimilitude of probability. The red light of lust illumines this case. A lecher-

ous James and a pulchritudinous Mary, utterly destroy the tissue of falsehoods on which this case was built.

So it is, that the court can not believe James, and believing Mary's story the more probable, the bailment is not proved. The court can not make a new contract between these people as it would be meretricious, if following the truth, and thus against public policy. We should not send his paramour to the penitentiary as she lived up to her bargain by at least part performance and return to McFarlane, the lure he so successfully used for her seduction.

Section 82 of the Civil Code of Panama, provides that the wife can not accept or repudiate a gift, nor enter into any contract without the consent of her husband. So Daniel Cooper, the husband, is not liable to McFarlane for any gift or pledge that she received from him. The money which was taken from the person of Daniel Cooper (and there is no evidence that any part of it is other than his earnings), should be returned to him, and if it was given for the immoral purpose of debauching his wife, no action can be sustained for its recovery.

This case is therefore reversed and the defendant found not guilty and the bail discharged, and the clerk of the court below ordered to transmit the \$315 in the registry of the court to Daniel Cooper.

The CHIEF JUSTICE concurred.

Reversed and remanded.

CASADO *versus* PALMER *et al.*

No. 54. Argued November 4, 1909. Decided April 21, 1910.

DAMAGES. BREACH OF CONTRACT.

The aggrieved party upon establishing that a contract has been entered into, in the absence of fraud or misrepresentation, is entitled to have and recover such damages as he may be able to establish as the direct result of non-performance.

Appeal by plaintiff from the Circuit Court of the Second Judicial Circuit, Canal Zone; Hon. H. A. Gudger, Judge.

The facts appear in the opinion.

Hinckley and Ganson, for appellant. *W. H. Carrington* for appellee.

WESLEY M. OWENS, J. This is an appeal from the Circuit Court of the Second Judicial Circuit of the Canal Zone, Hon. H. A. Gudger, presiding. The case was twice before that court. In the last trial judgment was obtained against the appellee James B. Palmer, for ninety dollars (\$90), United States currency, and costs of action, while the co-defendant, Carnot, was relieved from legal liability. Casado excepted to the judgment and made his motion for a new trial; such motion being overruled the same is now before this court for review on the motion and appeal of appellant alleging as error: First, insufficiency of judgment; second, error of court in directing the stenographer as to the matter of reporting certain evidence; third, prayer for specific performance. In the written brief and argument made to this court appellant abandons his third assignment of error and relies entirely upon assignments numbered one and two which alone will be considered by this court.

From the evidence it appears that in June, 1908, appellant and appellee (Palmer), entered into a written agreement for the sale to appellant of certain property, more particularly described as houses numbered five and six on the main street of Tabernilla, Canal Zone; the consideration mentioned in said contract was one thousand dollars (\$1,000), one hundred dollars of which was to pass with contract in the form of an order on one Pascal Canavaggio, while residue was to be paid the day the document of sale was made public or delivered.

The contract further provided among other things that Palmer was to vacate said house in the fixed period of three or four days, counting from the date of the execution of the contract. The contract bears the signature of the parties as well as of two witnesses.

The order for \$100 was accepted by Palmer but subsequently returned to appellant without being presented for payment. Appellant refused to accept return of order and at that time made a tender of the residue of nine hundred dollars (\$900) to be paid. Such tender was accompanied with the demand on Palmer for an instrument of conveyance of said property in compliance with contract. Palmer not only refused to accept the tender and deliver the conveyance, but alleged that he had been the victim of fraud and that appellant had fraudulently misrepresented not only the contents of the contract but other facts to him.

From the evidence it developed that Palmer did not and never

had owned property No. 6, and that while he did own property No. 5, he had made a lease for that house to defendant, Carnot, the date of which lease being one of the disputed questions of fact involved.

In the pleadings the answer of the defendant after making a general denial set up fraud and misrepresentation on the part of the plaintiff, but from the evidence before us there can be no doubt that the defendant executed the contract in question and did so apparently as his free and voluntary act.

From all the evidence giving light on the scene at the time the contract was signed, there can be but one conclusion, and that is, that there was a meeting of minds and every element of law observed necessary to constitute an agreement of this nature. The contract was executed and defendant accepted an order as cash payment on the sale.

Under defendant's averment of fraud we have given his allegation careful attention and on this issue there can be no doubt that the evidence preponderates in favor of the appellant, as the record is devoid of anything bearing even the earmarks of fraud or misrepresentation independent of the charge made by Palmer himself. It is true that house No. 6 did not belong to Palmer, but from the brief and argument of his attorney he was the agent of same and may have thought he could transfer it; but, however his motive, the weight of testimony finds him on the second of June by effort and by letter making offer to sell "both properties."

No fraud having been committed defendant should have met his contract or respond in adequate or "general" damages.

It is assigned that the court erred in not allowing the stenographer to report certain evidence. We can not agree with the contentions of counsel in this regard. From the record it appears that witness had been examined at length on such matters and anything added must have been but cumulative.

We now turn to the chief contention—insufficiency of judgment. With the contract established as having been entered into in the absence of fraud or misrepresentation, and its breach shown, the aggrieved party is entitled to have and recover such damages as he may be able to establish by evidence as the direct result of such nonperformance. From the evidence offered by the plaintiff as to his loss it is apparent the trial court could not have followed this rule. The cause is, therefore, reversed and remanded as to the amount of judgment, with directions that the appellant be allowed to show by proper proof, subject to all rights due the de-

fendant, such damages sustained by him as were the direct result of said non-performance.

Finding no other substantial error the evidence will be limited as to the question of damages due from Palmer to Casado. Let the same be certified.

JUSTICE COLLINS concurred.

Reversed and remanded.

JOSÉ H. STILSON *et al. versus* SANTIAGO SAMUDIO.

No. 55. Argued April 11, 1910. Decided November 25, 1910.

Appeal by defendant from judgment of the Circuit Court of the Second Judicial Circuit; Hon. H. A. Gudger, Judge.

Hinckley and *Ganson* for appellant. *C. P. Fairman* for appellee.

LORIN C. COLLINS, J. On this day came again the said parties and the court having diligently examined and inspected as well the record and proceedings aforesaid and the matters and things therein considered for error and being now sufficiently advised in the premises, are of the opinion that in the record and proceedings aforesaid and in the rendition of judgment aforesaid, there is manifest error.

Therefore it is considered by the court that for that error and others in the record and proceedings aforesaid, the judgment of the Circuit Court of the Second Judicial Circuit in this behalf rendered be reversed, set aside and for naught esteemed, and that this case be remanded to the said Circuit Court of the Second Judicial Circuit for such other and further proceedings as to the law and justice shall appertain.

And that said cause shall be heard before the Hon. H. A. Gudger, Chief Justice of this court.

And it is further considered by this court that the taxation of the costs and charges expended in this cause by the different parties abide the final determination of said suit.

JUSTICE OWEN concurred.

Reversed and remanded.

CHING CHEE FAT *versus* YEE HING LUNG, A. JACOBS
et al. PETITIONERS FOR LEAVE TO INTERVENE.

No. 56. Argued August 21, 1909. Decided September 18, 1909.

INTERVENTION. COLLATERAL ATTACK ON JUDGMENT.

Simple contract creditors who have no mortgage, pledge, or lien on a stock of goods held by the marshal under a levy of execution, issued upon a judgment rendered in favor of another creditor, are not entitled to intervene as against the common debtor, or as against the creditor in favor of whom the judgment has been rendered.

A judgment is not the subject of collateral attack by petitioners asking leave to intervene. The defendant alone has a right to except to any irregularity in the rendition of such judgment.

JUDGMENT LIENS. REAL PROPERTY. PERSONAL PROPERTY.

All judgments rendered at the same term of court are liens on the real estate of the defendant situated within the circuit in which such judgment is rendered, and there is no priority among them. (Section 467, Code of Civil Procedure.)

The lien of a judgment on personal property is determined by the endorsement on the execution of the day, hour or minute when the same was received by the proper officer. Under the Code of Civil Procedure, an attachment is merely perfected and its priority is determined by the hour of judgment. If, at the hour of judgment, no other judgment has been rendered, or no general bankruptcy proceedings have been begun and properly availed of, then the attachment writ becomes the same as an execution in the hands of the proper officer, properly dated and marked as to the hour of receipt, and is a first lien on the property seized thereunder.

Appeal by petitioners for leave to intervene from the Circuit Court of the Second Judicial Circuit; Hon. Wesley M. Owen, Judge.

The facts appear in the opinion.

Hinckley and *Ganson*, for appellants. *Sam B. Dannis*, for appellee.

LORIN C. COLLINS, J. The complaint in this cause was filed on February 15, 1909, and consisted of two counts. The appellants insist that it is not sufficient to sustain a judgment but the court finds the point not well taken. On the same day an order of attachment was issued and under writ the stock of goods of the defendant was seized.

On the following February 20 a petition was filed by A. Jacobs, J. H. Henriquez & Co., and Cardoze Brothers asking for the privilege of intervening in said action. The grounds set out in the petition show that they were simple contract creditors and disclose no mortgage, pledge, or lien of any nature or description on the stock of goods in the hands of the marshal.

The section of the code under which the right of intervention is asserted, provides that any person may intervene in any action where the intervenor "has a legal interest in the matter in litigation, or in the success of the suit or an interest against both." The interest here referred to means, that some lien, pledge, mortgage, or sale of the property in question had been made giving to the intervenor a peculiar interest in the property. The success of either party relates to cases where some kind of ownership had been conferred by partnership or assignment or some of the various other ways in which a person would become entitled to come in to court and set up an interest in the res and defend the action. This section was never intended to bring about a general or partial bankruptcy proceeding, or to confer on any simple contract creditor the right here claimed.

On the 5th of March next ensuing, judgment was rendered against the defendant, to which the intervenors except. This judgment was not the subject of collateral attack by the intervenors. The defendant alone has a right to except to any irregularity in such case. The court had jurisdiction of the parties and of the subject matter so that any judgment rendered in such case is not void but only voidable, when attacked in the well-known method and under the conditions that a third person is permitted in special proceedings to attack the same.

March 26, thereafter the defendant filed a petition in bankruptcy in the said court; the court refused to give to the same any effect as against the judgment already rendered. This also is assigned as error. In the case of *Maduro-Lupi Co. vs. Kee Chong Chang et al.* (Supreme Court Reports, p. 115), this court held that the Code of Civil Procedure and the Code of Commerce of the Republic of Panama were applicable to the Canal Zone.

In that decision the question did not arise that is presented in this case. There the bankruptcy proceedings were instituted prior to judgment. In the case at bar there was ample time to institute bankruptcy proceedings against the defendant prior to judgment. The objecting creditors slept on their rights. There perhaps should be the rule in the Canal Zone, as is the case in some of the

States of the United States, that all attachments brought at the same term share equally. As it is now, however, all judgments rendered at the same term of court are a lien on the real estate of the defendant and there is no priority.

The lien of a judgment on personal property is determined by the endorsement on the execution of the day, hour or minute when the same was received by the proper officer. Under our code in the Zone the attachment is merely protective and its priority is determined by the hour of judgment. If at the hour of judgment no other judgment has been rendered or no general bankruptcy proceedings have been begun and properly availed of, then the attachment writ becomes the same as an execution in the hands of the proper officer, properly dated and marked as to the hour of receipt and is a first lien on the property seized thereunder.

The law favors the diligent creditor, and the court finds no reversible error in the record. Let the judgment of the court below be affirmed.

The CHIEF JUSTICE concurred.

Affirmed.

KUNG CHING CHONG *versus* WING CHONG.

No. 57. Argued March 23, 1910.—Decided May 31, 1910.

WEIGHT OF EVIDENCE.

It is not the province of the Supreme Court to reverse a case on the facts unless the findings of the trial court were clearly at variance with the evidence.

REVENDECATION.

A revendicatory action may be brought by the one having the legal or equitable title to real property, and there is no limitation on the time within which such action may be brought, other than the usual period of prescription.

LAW AND EQUITY.

Under the Code of Civil Procedure of the Canal Zone, the distinction which prevails where the common law is practiced, between actions at law and suits in equity, is abolished.

CONTRACTS REQUIRED TO BE IN WRITING.

The provision of the Civil Code which requires that the acts or contracts which contain the delivery or promise of a thing worth more than 500 pesos must be in writing, applies only to those cases wherein a person promises to present another a chattel, or to sell for future delivery property worth more than 500 pesos.

DUE PROCESS OF LAW.

Due process of law embraces both substantive law and the practice or proceedings by which law is administered, and the practice, the construction of law and the remedies granted by the courts of the United States are a charge on and a jurisdictional part of the Circuit Courts of the Canal Zone. In cases arising after the establishment of the Circuit Courts of the Canal Zone, relief is to be given in harmony and in accordance with the established law of the United States, where life, liberty, and property are involved.

MANDATE.

A mandate is a contract whereby one person entrusts to another the direction of one or more business matters, the one so entrusted taking charge thereof for the account and the risk of the other. This contract does not differ from that of agency or trust and need not be in writing. The mandatory is required to render an account of his stewardship.

RESULTING TRUST.

A resulting trust may be created in the Canal Zone.

ERROR.

Any error committed by the trial court is not of necessity reversible.

Appeal by defendant from judgment of the Circuit Court of the First Judicial Circuit; Hon. H. A. Gudger, Judge.

The facts appear in the opinion.

Hinckley and *Ganson* for appellant. *Carrington* and *Todd* for appellees.

LORIN C. COLLINS, J. This was an action brought to establish a resulting trust. There were two trials, on the first of which the court found for the defendant and afterwards granted a new trial. On the second trial the court found for the plaintiff. A motion for a new trial being denied, the case is brought here on appeal.

The court below found the facts to be:

1. That Kung Ching Chong, the plaintiff herein, did from the month of January, A. D., 1908, conduct business at Miraflores, Canal Zone, under the name of Kwong Wo and Company, and that said Kung Ching Chong is the sole member of the said firm of Kwong Wo and Company;

2. That on or about the 23d day of January, A. D., 1908, said plaintiff constituted Wing Chong, the defendant, his trustee and agent to purchase for the said plaintiff the property described in

the complaint, and for that purpose, delivered said defendant the sum of \$700, United States currency;

3. That said defendant, Wing Chong, received from the said plaintiff the said sum of \$700 United States currency, for the purposes aforesaid, bought the said property described in the complaint, and the lease on which it is located, but took the title thereto in his, Wing Chong, the defendant's name;

4. That after the purchase of the said property described in the complaint, said plaintiff repaired, extended and improved the said property to the extent of its present condition;

5. That said plaintiff is the rightful owner of the property described in the complaint, the improvement thereto, and the lease on which said property is situate.

On these findings the court decreed:

First. That the said defendant Wing Chong forthwith convey by a good and valid deed to the said plaintiff Kung Ching Chong, the property described in the bill of complaint together with all the appurtenances thereunto belonging, as well as his right, title, and interest in and to the said lease for the land on which said property described is located, and that from the filing of this decree until the proper conveyance above described, be made from the said defendant to the said plaintiff this decree shall operate as a deed for the property above mentioned to the plaintiff, Kung Ching Chong.

Second. And that defendant pay all the costs of this action.

There were sharp conflicts in the testimony of the parties, but this court has not had the opportunity to see the witnesses or to determine their credibility; the court below had every opportunity so to do.

There was evidence to sustain the decree that was entered on the findings and it is not the province of this court to reverse cases on the facts unless the findings below were clearly at variance with the evidence. Such is not the case here.

A reversal is asked for on legal grounds. The first error assigned by the appellant is that the action is one of revendication and that under the terms of article 974, Civil Code, Panama, there should be an allegation in the complaint that the plaintiff had been in the quiet, peaceful, and uninterrupted possession of the premises, for a full year prior to the filing of the suit and that this allegation should be sustained by proof.

"Of Revindication" the said Civil Code treats under Title XII, articles 946 to 971 inclusive; "Of Possessory Actions," Title XIII

treats from articles 971 to 985 inclusive. It does not appear that they are one and the same action and surely they are not so treated in the code.

Article 950 reads:

A *revendicatory* action or an action of ownership may be brought by the person having the full or naked, absolute or *fiduciary* ownership of the thing.

Under this article the right is clearly given to the equitable owner of property to bring an action of ownership and have his title declared and established. The court finds no limitation on the time within which this action may be brought other than the usual period of prescription. Nothing more seems to be required.

The plaintiff did not bring an action under the Title XIII, but filed a general complaint setting out all the facts and asking for relief. He treats his action as though it were a bill in equity to establish a resulting trust. The defendant calls it an action of revendication. It is immaterial what the action may be called so long as the complaint states a good cause of action.

Under code pleading, the distinction which obtains where the common law is practiced, between actions at law and those in equity, is abolished. All that seems to be required is that the complaint state in methodical and logical form the circumstances which constitute the plaintiff's cause of action. (Sec. 83, C. C. P.—C. Z.)

The rule is, "From the facts the law arises." Where the common law is practiced, the prayer of the bill in equity, on demurrer, is not considered a part of the bill, nor can the demurrer be carried to the prayer, however wrongful the same may be.

In the case at bar there is a prayer for special and for general relief and the complaint is a sufficient pleading.

Therefore if this action were called revendication or bill in equity to establish a resulting trust, it presents in proper form the circumstances on which the action is predicated.

It is urged that the relief asked for can not be given on the facts for other reasons; one that the amount involved exceeds 500 pesos and the mandate should therefore be in writing, the action must fail.

Article 91, page 557 C. C. R. de P., reads:

The acts or contracts which contain the delivery or promise of a thing worth more than 500 pesos, must be in writing.

As the testimony in this case does not disclose that there was any contract or act for the delivery or promise of a thing the article has no application to the case at bar.

Should a person promise to present another a chattel real or personal or to sell for future delivery either chattel and the said chattels were each worth more than 500 pesos, then the said law might apply and then only.

The requirement in article 2158, page 443, *idem*, it is insisted requires that the mandate should be in writing.

This requirement of the Panamanian law is as strict in its wording as the Statute of Frauds and Perjuries, as found in any State of the Union. The line of decisions is uniform;

The statute of frauds has no application to a trust resulting from the purchase of property with funds of another. (Reynolds vs. Summers, 1. L. R. A., 327.)

Resulting trusts arising from law where the trustee or agent has purchased with funds given for such purpose and taken conveyance or title in his own name may be proved by parol.

Dyer vs. Dyer, 1 Ld. Cas. Eq., 215.

Boyer vs. Libby, 88 Ind., 235.

Adams vs. Adams, 79 Ill., 517.

All trusts which arise by operation of law, as the name indicates, are excepted from the requirements of the statute of frauds.

Pom. Eq. Jurs. 3d, Ed., sec. 1030.

Ward vs. Armstrong, 84 Ill., 151.

The above principle is elementary and the multiplication of authorities would be a work of supererogation.

What effect has the letter of the President of the United States of May 9, 1904, to the Secretary of War on this rule? The material words are as follows: "The laws of the land, with which the inhabitants are familiar, and which were in force on February 6, 1904, will continue in force in the Canal Zone."

The most cursory reading of these words should satisfy the most critical that the powers of the courts of the Canal Zone were not here defined but that a provision was made to protect vested rights, and to furnish rules of action for the inhabitants.

The words mean no more and were intended to mean no more. A usual and customary provision in such case.

What is a Circuit Court of the Canal Zone? A court limited in its jurisdiction by the substantive law of Panama? Not so. They are courts of equal plenary jurisdiction with the Court of Kings Bench in Great Britain and the Circuit Courts of the States of the Union and the United States.

Courts of the highest jurisdiction in the world. Nothing jurisdictional is withheld from them. Over the life, the property, and liberty of the litigants before them they possess all jurisdictional power.

The said letter also directs, "That no person shall be deprived of life, liberty, or property without due process of law." Due process of law was defined in 4 Wheaton, 235:

As to the words from Magna Charta incorporated in the constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind, has at length settled down to this—that they were intended to secure the individual, from the arbitrary exercise of the power of government, unrestrained by the established principles of private rights and distributive justice.

Due process of law undoubtedly means, in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights. 12 N. Y., 209. "Law in its regular course of administration through courts of justice is due process; and when secured by the law of the State, the constitutional requirement is satisfied." (139 U. S., 462.)

It is not necessary to multiply citations. The great truth appears from the reports and the text-writers that due process of law embraces both substantive law and the practice or proceedings by which law is administered.

Therefore, in this case, the practice, the construction, the remedies granted by the courts of the United States are a charge on and a jurisdictional part of the Circuit Courts of the Canal Zone.

Transplanting courts of plenary jurisdiction to a land barren in liberal and generous construction can not operate to take from such courts their inherited jurisdiction as enjoyed in the land of their origin.

In determining the vested rights of people in the ceded territory of the Canal Zone, this inhibition is upon the courts; but in cases arising after the establishment of said courts, relief on facts subsequently arising, is to be given in harmony and in accordance with the established law of the United States, where life, liberty, and property are involved.

Therefore property here is governed by the inhibition that it shall not be taken away without due process according to the common law of the United States.

As there are no authoritative decisions of the Supreme Courts of Colombia or Panama on the meaning of their statutes the courts of the Canal Zone are in duty bound to follow the rules of statutory construction of the courts of common law and ascertain by them the meaning and the spirit of the codes.

Title XXVIII C. C. R. de P. treats of mandates and the obligations of mandatories. Article 2142 says that a mandate is a

contract in which one person entrusts to another the direction of *one* or *more* business matters and who takes charge thereof for the account and the risk of the former.

In what particular does this differ from the agency or trust the accepted facts have placed before the court? Not in the slightest degree.

This relation under the Code can be treated (art. 2149 *idem*) by public or private instrument: By *letters, verbally, or in any other intelligible manner, and even by the tacit acquiescence of a person to the management of his affairs by another.*

In this there is no suggestion of anything other than the greatest liberality of a determination to so draw a statute as to make it applicable to any and every case that may arise from the turpitude or the baseness of human nature.

The mandatory is required under article 2181 to render an account of his stewardship.

The article (2158) by its words and by fair construction is only applicable to cases of general administration, which takes this case out of its purview. It says "the power to perform acts of administration" and enumerates for the purpose of illustration various acts which do not require a special power of attorney.

Why should one contend that if a man gave to another 600 pesos to deposit in bank to his credit that a special power of attorney would be necessary to protect him against the cupidity or dishonesty of the agent or servant so selected or entrusted?

Has the business of the great Spanish Main been conducted on so weak and slender a thread? The court does not believe that the Spanish law holds forth such allurements to dishonesty.

The article in question refers to one appointed to represent the mandate in more than one matter; in a general administrative capacity. As appears from the article itself many different things can be done under a verbal mandate and the mere circumstance that everything was not mentioned in the things that a man could be delegated so to do, does not mean that the verbal mandate is limited to those things which are merely used as illustrative, but to acts of like nature.

By the plain intent of the code one may authorize—"The direction of *a matter* which is the object of the mandate," (Art. 2149) *verbally or in any other intelligible manner.*

Under the rules of the common law express trusts must be in writing and the statutes of many States so declare; but despite

this plain statutory enactment implied trusts exist and embrace within their ample folds resulting and constructive trusts.

The article is evidently intended to cover express trusts and not those created by operation of law, under the common law.

In so construing this title the court is giving effect to what seems to have been the intention of the lawgivers. Any other construction would open the doors to wrong and outrage; their success being only limited by the craftiness and the knowledge of those given to such courses.

No greater system of substantive law has been prepared by man than the Spanish Code; but it must be always carried in mind that by reason of its universality it must at times lack in specificity and that into its universality must be breathed the spirit of liberal construction.

And yet in the case at bar the Spanish law fits the facts even though substantive, while in the courts of the United States constructive and resulting trusts are daily determined, with no substantive law to support the court's jurisdiction.

The court can not hold that the Panamanian Code would require a mandate of this kind to be in writing, it being clearly permitted by the provisions of the code; but were it not, this court would still be bound to declare a resulting trust for the reasons already given.

There being no reversible error, as error does not always reverse, and the court feeling that every opportunity was given to both parties and that the trial was fair, the judgment below is affirmed with instructions to the Circuit Court of the First Circuit to carry into effect the decision of the said court.

The costs of this appeal to be taxed against the appellant.

JUSTICE OWEN concurred.

Affirmed.

THAYER *versus* ANDRADE.

No. 58. Argued January 24, 1910. Decided April 1, 1910.

WEIGHT OF EVIDENCE. CONFLICTING TESTIMONY.

It is a well settled principle that unless the finding of the trial court is plainly and manifestly against the weight of the evidence, the same will not be disturbed, inasmuch as the trial court has a better opportunity to judge of the weight to be given to the testimony of the witnesses, since they appear in person before the trial court.

If the evidence, though conflicting, be sufficient to support the judgment of the trial court, the same will not be disturbed.

Appeal by defendant from the Circuit Court of the Third Judicial Circuit, Canal Zone; Hon. Lorin C. Collins, Judge.

The facts appear in the opinion.

Carrington and Todd for appellant. *C. P. Fairman* for appellee.

WESLEY M. OWEN, J. This appeal is prosecuted from a judgment of two hundred (200) dollars entered by the trial court after hearing the evidence in the case and overruling a motion for a new trial. From the record it appears that some difficulty was encountered in arriving at an issue.

Appellee, in his last amended complaint, alleges that there was due him from the appellant the sum of two hundred (200) dollars, which represented the balance on a contract of three hundred (300) dollars. The claim is based on the work of appellee as an architect in furnishing to the appellant certain plans and specifications, which it appears from the evidence were used in the construction of a number of buildings, and in this particular the appellee testifies that the appellant not only authorized and contracted for the plans and specifications but accepted the same when tendered and likewise used them in the construction of certain buildings. The testimony offered in this particular is controverted and in fact denied in every particular by the appellee.

In the presentation of the case to this court questions of law are raised by the attorney for appellant, who takes exception to the action of the trial court in deciding a number of motions and amendments. Such are in no way vital, as they present only immaterial matters.

A careful perusal of the record discloses that the main contentions of appellee are all denied by appellant. In this particular

the court below found with the appellee. We are not disposed to disturb such finding of fact, as it is a well settled principle of practice that unless the weight of evidence is manifestly against the finding of the judgment of the tribunal who heard the witnesses, saw their manner of testifying and therefore, had much better opportunity to judge of the weight to be given their testimony than the reviewing court, the finding should not be disturbed.

In the case at the bar the evidence though conflicting is sufficient to support the judgment of the trial court and will therefore be affirmed.

Such judgment is therefore affirmed. Let it be so certified.

The CHIEF JUSTICE concurred.

Affirmed.

VILLALOBOS *et al.*, versus FOLESTON *et al.*, UNITED STATES OF AMERICA, Intervenor.

No. 59. Argued January 19, 1910. Decided November 9, 1910.

WEIGHT OF THE EVIDENCE.

Whenever the judgment or decree of the trial court or of the judge thereof is plainly against the weight of the evidence, the same will be reversed.

Appeal by defendants and intervenor from decree of the Circuit Court of the Third Judicial Circuit; Hon. Lorin C. Collins, Judge.

The facts appear in the opinion.

Carrington and *Todd* for defendants-appellants. *G. M. Shontz* for intervenor. *C. P. Fairman* for appellee.

WESLEY M. OWEN, J. On February 13, 1908, Lino Villalobos, a son, along with ten other alleged landowners, filed their complaint in the Circuit Court of the Third Judicial Circuit of the Canal Zone, in a proceeding entitled, "An action in ejectment and to quiet title to real estate."

The action so instituted was against a large number of defendants, the names of some being unknown.

It was alleged in the complaint that certain defendants, naming them, were wrongfully residing upon or occupying part of the lands owned by the complainants, and that such defendants so in possession and occupancy were wrongdoers as against the

aforesaid rightful owners. Addressed to all such so in possession the action of ejectment ran with concluding prayer for restoration of the property and claim for fixed damages. The added relief sought by the complaint was prayer for a decree of court quieting and establishing title in and to the complainants as against all and every adverse interest, right or claim held or represented by defendants in and to the real estate more particularly described in the complaint as follows, to wit:

Beginning at a point on the beach or shore of the Bay of Limon at the place called Playa de Flor, 4,254 feet south, 18 deg. 39 min. west (magnetic bearings) of the lighthouse located at the place called Punto Toro, at the west side of the entrance to the Bay of Limon; thence south 51 deg. 30 min. west (magnetic bearings) 11,537 feet to a point on the creek or stream known and designated as Santa Rita, the said line being the northwest boundary; thence following the meanderings of said creek or stream from the said northwestern boundary line to a point 1,943 feet south thereof, and in a direct line at right angles from the said northwestern boundary line; thence north and easterly and parallel to the said northwestern boundary line at a distance of 1,943 feet south and east thereof, 11,137 feet more or less, to a point on the shore of the said Bay of Limon at a place called Los Pescaderitos, the same being the southeastern boundary; thence following the meanderings of the shore of said Bay of Limon in a northwesterly direction to the point of beginning; the said tract or parcel of land containing 518.6 acres, more or less.

Endeavoring to establish ownership in the premises the complainants offered evidence in support of that portion of their complaint wherein allegation of title and manner by which it was acquired, was shown. Appreciating the importance of such allegations, in the light of the evidence offered, and the opinion which follows, recitation of the same is here made:

First. That said complainants are residents of the place known and designated as Playa de Flor, within the limits of what is now termed the Administrative District of Cristobal, Canal Zone, and within the jurisdiction of this court, and the city of Colon, Republic of Panama.

Third. That Feliciano Villalobos, deceased, father, father-in-law, and grandfather, respectively, of the above-named plaintiffs, died intestate on or about the 30th day of April, 1876, possessed of the title and in the actual possession of the real estate hereinafter described, leaving as his sole surviving heirs at that date José S. Villalobos, son; Lino Villalobos, son; Fulgencio Villalobos, son; and Antigua Villalobos, daughter.

Fourth. That José S. Villalobos, son and heir of the said Feliciano Villalobos, deceased, died intestate on or about the first day of December, 1907, leaving as his sole surviving heirs, Eufracia G. Villalobos, widow; Lucia Villalobos, daughter, Feliciano G. Villalobos C., son; Fermín Villalobos C., son; all of age; and Leonardo Villalobos C., son; Florencio Villalobos C., son; Clara Villalobos and Cecilia Villalobos, daughters, children and minor heirs.

Fifth. That the said plaintiffs as sole surviving heirs of Feliciano Villalobos, deceased, and his son José S. Villalobos, deceased, are the absolute and sole owners in common of the premises. * * * * *

The above land being described in a denouncement made thereof by said Feliciano Villalobos, deceased, in the Official Gazette of Panama, No. 34, under date of March 15, 1856, and denounced in the Official Gazette of Panama, No. 1189, at page 1250, under date of September 14, 1898; a translation of said denouncement being as follows:

No. 16. Feliciano Villalobos, as owner of the land called Playa de Flor, whose boundaries and limits are on the front by the ocean at Playa de Flor to the place called Los Pescaderitos in depth, and extending in parallel lines from one to the other extreme unto the place known by the name of Santa Rita, have presented a document with four witnesses made before the Judge of the District of Colon in December, 1855.

Sixth. That the plaintiffs herein and those under whom they are claiming have been in the exclusive adverse and actual possession and ownership of the above-described real estate since the year 1855.

Seventh. That all records of title of said property prior to the year 1885 have been lost or destroyed in the burning of the City of Colon in that year, and that there is now no documentary evidence or other records showing title in the above-named plaintiffs excepting such as hereinbefore stated.

In due course proper service was made, and answer of all defendants filed, save and except one who was by the court defaulted.

On July 1, 1908, the United States Government, by counsel, appeared and filed its bill of intervention, claiming and maintaining absolute title and sovereignty to premises in question. Leave was granted to such intervenor to be made a party defendant with right and time to answer in due course. Such answer being filed, and the complainants having likewise answered the bill of intervention, the Clerk of Court caused a land title notice, naming defendants and "all to whom it may concern," to be published for three consecutive weeks as provided by law. Proof of publication being filed, issue was joined and the cause advanced to trial, when the evidence of plaintiffs was offered. At the conclusion of the evidence so offered by plaintiffs the defendants filed their demurrer to the testimony, and moved that the case be dismissed on the proof adduced as failing to establish title, and contention of complainants. In the presentation of such motion defendants announced their intention to stand by such motion and offer no proof or further defense. The intervenor, the United States Government, joined in the presentation of the demurrer by like-

wise moving a nonsuit but declined to rest on the motion, and subsequently offered its proof by calling to the stand Dr. Inocencio Galindo and Governor Porfirio Melendez.

On the 24th day of May, 1909, the trial court filed its decree, finding the issues in favor of the plaintiffs and against the defendants, including the intervenor, the United States Government. The relief sought by the complaint was granted and judgment and decree entered for possession and damages. From the action of the trial court, first, in overruling the defendants' demurrer to plaintiffs' evidence, and denying motion for nonsuit made by the intervenor, the United States Government; and, second, in granting decree and relief to plaintiffs, the cause is brought to this court for review.

The evidence offered by plaintiffs in support of title was far from that clear, convincing, and conclusive character which the law contemplates. Following the proof of survey the first witness offered, E. R. Cowan, was not acquainted with the original Villalobos nor his wife. He testified that the Villalobos family lived at Playa de Flor across the Bay, but on cross-examination admitted he had never been there and that this information and knowledge was from what others had told him. Romano Emilian, the second witness, knew only the Villalobos children and was not familiar with the premises. The fourth witness, Jean Gris, knew the Villalobos family. He went to Playa de Flor to hunt but had not been there for some years. Did not know the boundaries. Knew a Frenchman and others that occupied land at Playa de Flor; that an Italian "Rifo" was original owner; that he had sold it, but papers were burned in Colon. Pedro Cerezo testified as to acquaintance with the original Villalobos and children; that they lived in Playa de Flor, but he knew nothing as to a description of the premises or time of occupancy.

The above evidence is referred to as constituting the only testimony offered save by the plaintiffs, five of whom were called, that is; Antigua, Lino, Fulgencio, and Feliciano, and in addition Eufracia, the widow of José Villalobos, deceased.

The trial court in his findings of fact credited the plaintiffs with uninterrupted occupation and possession (except as to defendants Foleston and others) since 1846. We have searched the testimony and record in vain for such proof. Fulgencio Villalobos, age 42, at the time of testifying, and a child of Feliciano Villalobos, was asked:

Q. Do you know when your father entered that land?

A. I was very small. I could not say.

The other testimony on this point was equally as uncertain. Plaintiffs offered in evidence the Official Gazette of Panama, and from chapter 17 of that organ, Feliciano Villalobos, the original ancestor, made declaration of denouncement of land denominated Playa de Flor before the District Judge of Colon in the presence of four witnesses in December, 1855. This is the first proof positive of occupancy. No attempt was made to show any declaration or act establishing occupancy or possession of any particular date or time, and the evidence of such of the plaintiffs who testified on the question of possession fails to disclose or establish any definite or even indefinite date. Having referred to the evidence offered let us now weigh its effect. It will be recalled that plaintiffs allege in the third paragraph of their complaint that the original ancestor died in 1876, possessed of title and in actual possession of premises. In the fifth paragraph they allege that the descendants (plaintiffs) are the absolute and sole owners in common of said premises and improvements. And in the sixth paragraph that plaintiffs, and those under whom they are claiming, have been in exclusive, adverse and actual possession and ownership of premises since the year 1855. Now, on which branch of the tree must we find the fruit? Proof was adduced as to ancestor's death in 1876, but there is an absence of title or ownership in the ancestor. Offer was made as to a subsequent fire in Colon, but had any title or evidence of title been recorded some proof would have remained or been accessible to the complainants. From the evidence of Galindo, a witness for the intervenor, it appears that Charles V., of Spain in 1521 set aside all the lands on the sea coast from Nombre de Dios to the mouth of the Chagres River as lands pertinent and belonging to the municipality of Nombre de Dios; that for no apparent or obvious reason this grant was subsequently ignored, but the premises, which included Playa de Flor, were afterwards held by the Crown and continued as public lands or *tierras baldias*, and, as such, recognized by New Granada and the Republic of Colombia. Nowhere in passing down through the history of events and nations, as shown by the record, do we find evidence divesting the sovereignty of title and establishing it in the original Villalobos or any member of his family. Occupation and possession unattended by proof of recognition and fulfillment of the *lex loci* will never justify a legal decree to real estate. Land once ac-

quired, or even subject to acquisition from the Government, commands from the law recognition and consideration. Plaintiffs argue adverse possession and the same ripening into a fee simple title. Granting the premises free and subject to acquisition by adverse occupancy and possession, the record is silent as to any act of the plaintiffs, independent of cultivation, in completing title or transferring same from the Government either during the reign of Spain, New Granada, Colombia, Panama, or the United States. (It is an established principle that plaintiff must recover where the allegation of title is made in complaint on the strength of his own right and not the weakness of his adversary.) Effort is made to maintain ejectment. A legal remedy where the law usually contemplates a legal and not an equitable title in one seeking relief. The trial court said that "Titles can not be drawn from the clouds; there must be something real to them." True it is, and in the case at bar what proof has been adduced that would divest the Government of ownership or establish same in the original ancestor or any of his heirs? Further, contention is made by plaintiffs that the original Villalobos went into possession, occupancy, and cultivation of the premises prior to the construction of the Panama railroad and even before the Interoceanic Canal project had been suggested; that even if the premises were *tierras baldias*, or public lands, the same were only held as such, subject at any time to be acquired by cultivation or by direct grant from the Government; that the original Villalobos entered into possession of the premises and was entitled to a decree of possession under the law of prescription. From the proof offered, the premises, as early as 1521, were set aside as public lands in which the sovereignty continued title. As such it must remain until the Government is divested of its rights and the same have been acquired. Argument is made as to the definition or interpretation of the term "*tierras baldias*," the contention being that the same referred to lands freed from public use, open to cultivation, subject to being acquired by prescription, and that in 1846 lands so held and declared by the Government could be acquired by prescription. We deem it unnecessary to extend this opinion in defining the conclusion of the court on such question for the reason that, as before stated, the record is without proof such as would establish time or date as to possession or occupancy by the senior Villalobos before 1855 when public denouncement was made. Much is offered as to cultivation and occupancy but such proof is immaterial as title by prescription, even if the same could be main-

tained, can not be established on the naked showing of cultivation and occupancy in the absence of a completion of the effort in divesting the government of its interest by a strict obedience to the law of the land. The law of Colombia, in force during the period it is presumed plaintiff maintains date of occupancy, offers a remedy, but there is an absence of proof that the plaintiffs ever availed themselves in following up or completing evidence of good title.

Many and divers questions were raised and presented at length in the elaborate and well-prepared briefs of counsel. Argument was offered by litigants, including the intervenor, the United States Government, as to claim and interest of each in the premises; likewise the question of acquiring title by prescription as against the government; also the action of complainants in seeking double relief as prayed for in their complaint; as well as many other legal propositions; but, as it is apparent, the conclusions heretofore reached, from the evidence offered, must decide the case, it is unnecessary to consider other matters. The complainants failed to produce proof establishing title, or evidence of any act or acts justifying a decree of title, and, having so failed, it is immaterial as to other minor questions involved. Without title or evidence of a rightful claim to it, there is no foundation upon which the court could predicate a decree giving relief, be the same legal or even equitable. That such a course of decision is called for by the highest considerations no one can doubt. We appreciate the range of liberty and the limited knowledge accessible by all who tilled the particular lands in question, but in weighing sentiment we must deal with the momentous question of title not alone in presente but in futuro as all subsequent grantees are entitled to a good chain of title. Those who first settle on lands—tierras baldias—do so with notice of title in the government. True, decisions exist where interests in incorporeal hereditaments, after immemorial or long-continued enjoyment, ripen into a fixed right or title. Equally true are the laws defining open, notorious, and peaceable possession, with the length of time necessary to complete a prescriptive claim, but the allegations in complaint of title or declarations of prescriptive or declaratory acts pretentious to thread or color of title, in case at bar have proven useless, being unsupported by evidence of the several stages or degrees requisite to establish a right to form or complete title. Standing before us is the former decision of this court in the United States *v. Andrade*, page 71, volume 1, Canal

Zone Supreme Court Reports, in which this court has said, "By prescription public lands can not be acquired." (Art. 3, Law 48, 1882.) True, contention is made such is not applicable in case at bar as claim of the original Villalobos is anterior to the time such opinion was made, but the conclusions of the court in this as well as the other questions referred to can command no great place in this opinion for the reason, as above expressed, that the action of this court in its interpretation of the evidence offered must decide the controversy.

It is, therefore, ordered, adjudged, and decreed that the decision of the trial court in overruling the motion made to dismiss the action at the close of the evidence offered by the complainants be and is reversed, and that the cause is hereby dismissed with judgment against the complainants for all the accumulated costs.

Let the same be so certified.

The CHIEF JUSTICE concurred.

Reversed.

AROSEMENA *versus* PAREDES.

No. 61. Argued February 14, 1910. Decided May 21, 1910.

CONSTRUCTION OF PLEADINGS.

A complaint argumentative only in minor parts, but nevertheless containing a methodical and logical statement of what constitutes a cause of action, will be sufficient to meet the requirements of the Code of Civil Procedure.

PREPONDERANCE OF EVIDENCE.

As to the questions of fact involved in a cause properly brought on appeal to the Supreme Court, if the preponderance of the testimony supports the judgment of the trial court the same will not be disturbed on appeal.

OCULAR INSPECTION.

In real property disputes the court may make an ocular inspection of the premises and consider the same in rendering its decree.

Appeal by defendant from the Circuit Court of the First Judicial Circuit, Canal Zone; Hon. H. A. Gudger, Judge.

The facts appear in the opinion.

Sam B. Dannis for appellant. *Oscar Teran* for appellee.

WESLEY M. OWEN, J. This suit was originally instituted by Miss Elena Arosemena, a resident of the city of Panama and owner of a certain portion of land detached from the hacienda known and denominated as "Lo de Caceres," and situated near what is known as the Sabanas Road, and more particularly described in the complaint as follows:

A straight line from the top of the hill called Barro Colorado, which is located within sight of the house of the hacienda Lo de Caceres to the top or highest point of the hill called Gallinero, located on lands of the hacienda Loceria; said hill called Gallinero being in line with the one at the starting place and with the Pava and Ancon Hills.

Another straight line from the said Barro Colorado hill to the headwaters of the creek Carrasquilla passing through the small hill called Brano Cerda. And is known by the name of El Club.

Appellee secured such realty under conveyance describing said property as above set forth. When attempting its occupancy a dispute arose with the appellants, who owned adjoining estates, over the boundary line of the hacienda herein described. In the chain of title describing the boundary, it appears that the dividing line between the property of the appellee and that of the appellants is marked on a certain map where the location and identification of the hill Barro Colorado is designated, according to the contention of said appellee, with the initials "H. A." while the defendants hold to the theory that said hill on such map is marked and denominated as "A. Z."

Another disputed point was as to the headwaters of the creek Carrasquilla, so named and described in the deed of conveyance, but with no fixed monument to aid the parties interested in locating such position.

The cause was heard by the lower court and on suggestion and agreement of attorneys as well as parties litigant, an ocular inspection of the premises and of the particular points involved was made by the trial court, who apparently viewed the premises and made calculations and inspections with care.

Following this ocular inspection the case was again opened and testimony heard, and, from the record, every opportunity extended to parties litigant to show and establish their respective contentions. The trial court found all issues with the appellee and decreed the boundary lines as set forth in the complaint.

On appeal to this court counsel for appellants based his contentions on two apparent assignments of error:

First, that the original complaint failed to set forth facts sufficient to constitute a cause of action; and

Second, that the judgment and finding of the trial court was manifestly against the weight of testimony introduced, including facts disclosed and established by the ocular inspection.

We have considered such questions and find that the complaint of the appellee, while in some minor way argumentative, is a statement in a methodical and logical form of what constituted the cause of action. This meets the requirements of our Code and is, *pro forma*, sufficient.

As to the finding of the trial court in regard to the questions of fact involved, we are convinced from the record the preponderance of testimony clearly supports the judgment.

Additional error was mentioned alleging that the trial court gave unwarranted significance to the ocular inspection. The Code of the Canal Zone provides for such inspection and as the record discloses that said inspection in the case at bar was only made after suggestion and agreement of counsel, the appellants are now bound by the facts there disclosed and the trial court was correct in giving to the evidence so procured equal weight of other proper testimony.

The judgment and decree of the lower court will therefore be affirmed in every particular and the boundaries, or particular points in dispute, of the hacienda known as El Club will be fixed as recited in the decree and finding of the lower court.

Let the same be so certified.

JUSTICE COLLINS concurred.

Affirmed.

ANKROM *versus* EGAN *et al.*

No. 62. Argued January 24, 1910. Decided April 15, 1910.

PARTNERSHIP.

A partnership may be proven by oral testimony, including verbal admissions of the alleged partners.

INTEREST ON JUDGMENTS.

Upon the affirmance of a judgment of a Circuit Court in the Supreme Court, the same draws interest at the rate of 6 per cent per annum until paid from the date of its original rendition in the court below.

Appeal by plaintiff from the Circuit Court of the Second Judicial Circuit, Canal Zone; Hon. Wesley M. Owen, Judge.

The facts appear in the opinion.

Hinckley and *Ganson* for appellant. *Carrington* and *Todd* for appellees.

LORIN C. COLLINS, J. This was an action brought to recover of Egan, Cuvellier, and Thornton as copartners the sum of \$930.55, United States currency, for supplies furnished to a saloon in Tabernilla.

As to the amount of the indebtedness there is no dispute; the only contention being raised by Cuvellier and Thornton that they were not partners of Egan in the saloon.

On the first trial judgment was rendered against the three but afterwards a new trial was granted on the ground of newly discovered evidence.

On the second trial Egan swore that Cuvellier and Thornton were his partners. Ankron testified that Egan and Cuvellier told him that the three were partners. Carnot stated that he sold his business to Egan, Cuvellier, and Thornton. Being asked what Thornton said to him concerning his connection with the business he replied that Thornton told him that Cuvellier and he (Thornton) were partners in the business.

The defendants offered no evidence but demurred to that of the plaintiff.

The court sustained the demurrer and found the issues for defendants. This was error. A perfect case was made by the evidence presented and the issues should have been found for the plaintiff, and his damages assessed at \$930.55 and the defendant Lam Hing Lung ordered to pay the \$900 with interest to the plaintiff to be applied in the reduction of the judgment.

This cause is, therefore, reversed and judgment entered here for the sum of \$930.55 with interest at the rate of 6 per centum per annum from the date of the first judgment in said cause, to wit, April 16, 1909. The clerk is directed to make such computation of interest, add the same to the \$930.55 and enter judgment for the amount so found. It is further ordered that the said defendant, Lam Hing Lung, pay into the registry of this court the sum of \$900 together with such interest as may be due thereon, not however in excess of the judgment and costs of this case.

It is further ordered that the costs of this proceeding be taxed against the defendants Egan, Cuvellier, and Thornton, jointly and severally.

The other errors assigned are not necessary to discuss in view of the conclusion reached by the court.

The CHIEF JUSTICE concurred.

Reversed with judgment.

UNITED STATES OF AMERICA *versus* H. V. SEIXAS.

No. 64. Argued April 20, 1910. Decided September 7, 1910.

CERTIORARI. PETITION.

A petition filed in the Supreme Court praying for the issuance of the writ of certiorari, which contains no averment that the exceptions taken at the trial or to the rulings of the court in denying an appeal were preserved by bill of exceptions, can not be heard in this court.

Application by petitioner for a writ of certiorari directed to the Circuit Court of the Second Judicial Circuit; Hon. H. A. Gudger, Judge.

C. P. Fairman for petitioner. *Frank Feuille* for respondent.

LORIN C. COLLINS, J. This cause comes on to be heard on the motion of the respondent to quash the writ of certiorari on three grounds, which are, as follows:

First. This court is without jurisdiction:

- (a) Because the petition for the writ was not presented to this court; nor was the writ awarded by it; nor was any action had by the court thereon.
- (b) Because it is not made to appear in the petition that the trial court complained of, exceeded its jurisdiction in any manner.

Second. If as contended for by plaintiff in error he was entitled to an appeal to the Supreme Court from the judgment of the Circuit Court, which the defendant in error specially denies, his petition fails to show that he has made any effort to perfect an appeal in the manner provided by law.

In the consideration of the question whether the writ was improvidently issued, the last point raised is, in the opinion of the court, sufficient to dispose of the cause.

The petition contains no averment that the exceptions taken at the trial or to the ruling of the court in denying the appeal to this court were preserved by bill of exceptions.

This court can not review the evidence in any cause, unless the same is preserved in the manner pointed out in the Code.

The refusal to allow an appeal can not be availed of, unless the party aggrieved thereby excepts to the denial thereof and preserves said exception in his bill. (Sec. 136, C. C. P.)

The very full and complete exhibit of the respondent does not help the plaintiff in error as it shows that nothing was done to preserve for this court the exceptions made in the court below, and that there was a total failure to exhaust clear legal remedies.

It is therefore considered by the court that for the reasons given the writ of certiorari should be quashed and the petition dismissed at the costs of plaintiff in error.

JUSTICE OWEN concurred.

Writ denied.

THE SOUTHERN SAW MILL COMPANY *versus* EHRMAN AND COMPANY.

No. 65. Argued April 20, 1910. Decided May 12, 1910.

JURISDICTION. SERVICE.

When service of summons is had upon defendants who are found within any circuit in which the action has been filed, the court obtains thereby jurisdiction of the cause.

If the defendants were not the victims of intrigue or coercion, when service was obtained upon them in the Canal Zone, they, having voluntarily brought themselves within the jurisdiction of the court, have no greater rights than those whose legal domicile is within the Canal Zone.

Appeal by plaintiff from the Circuit Court of the First Judicial Circuit, Canal Zone; Hon. H. A. Gudger, Judge.

The facts appear in the opinion.

Hinckley and *Ganson* for appellant. *G. M. Shontz* for appellee.

WESLEY M. OWEN, J. The appellant, a corporation of the State of Louisiana, filed its complaint in the First Judicial Circuit of the Canal Zone seeking to recover from Ramona Ehrman, Adela Ehrman de Ehrman, John Ehrman, Felix Ehrman, comprising a copartnership, doing business under the firm name of Ehrman & Company, (bankers), of the city of Panama, Republic of Panama. Summons of court issued and was returned showing personal service, within the circuit, on John Ehrman and Adela Ehrman de Ehrman.

Incident to passing on the questions presented, we deem it unnecessary to refer to the allegations of the pleadings, except to mention that the action was instituted, seeking to recover a claim of \$2,141.29 United States currency, which it is alleged was collected by the appellees for the credit of the appellant.

From the record it appears that John Ehrman—limiting such appearance for the sole purpose of pleading to the jurisdiction of the court—appeared for himself, the copartnership and his copartners and defendants, and recited “The residence of the appellees is in a foreign jurisdiction” * * * “That the action, in that the transaction, or any part of it, did not occur within the jurisdiction of the court.” This plea was concluded with prayer for the dismissal of the action with proper costs, etc.

The trial court sustained said plea to the jurisdiction and dismissed the action. Exception to such order was saved by appellant and appeal prayed and perfected to the Supreme Court of the Canal Zone, and the cause is before this court for review on the action of the trial court in dismissing the case for want of jurisdiction.

The Code of Civil Procedure of the Canal Zone; Section 393, provides:

* * * And all actions not herein otherwise provided for may be brought in any circuit where the defendant or necessary party defendant may reside or be found, or in any circuit where the plaintiff or one of the plaintiffs resides, at the election of the plaintiff, except, in cases where other special provision is made by the Code. * * *

This is certainly applicable in the case at bar. The question of jurisdiction, in actions of this nature, must turn on the fact of proper service. When the defendants were found, of their own volition, within the legal boundaries of the First Judicial Circuit and were served with process, the court obtained jurisdiction under the Code—especially in so far as the defendants served.

No showing is made, neither is the defense offered, that defendants were the victims of intrigue or coercion, when service was obtained, and as they voluntarily brought themselves within the jurisdiction of the court, they stand the same, with equal rights but certainly no more, as those who have their legal domicile in the Canal Zone.

Existing under an administrative form of government, with executive orders recognized as laws, and with no statute to determine “legal residence” or “citizenship,” the Code of the Canal Zone, with much wisdom, recites that “ * * * The defendant who may be found, within the circuit * * * may be served in all actions not otherwise provided for,” etc.

The trial court erred in dismissing the action. The plea to the jurisdiction should have been overruled.

Counsel for appellant followed their complaint in the court below with request for the writ of attachment. They insist on an order here directing the writ to issue. In view of the ruling of this court on the question of jurisdiction, the prayer for such writ of attachment should now be addressed to the trial court, who should act in accordance with the showing made.

Counsel for appellant, in the oral argument made to this court moved for an order, in the event said cause was remanded, directing the case to be docketed and heard in another circuit.

The request was unsupported, and no cause assigned or showing made, why the case should be transferred. The Code provides for such transfer where justice demands, but we do not think it contemplates the change on mere suggestion or caprice of counsel, unsupported by a proper showing. Then, if just cause exist why the action should not again be heard by the former court, counsel have their remedy when the cause is redocketed.

It is therefore ordered, that the action of the trial court in sustaining the plea of the appellees and dismissing the action, be reversed, and the cause remanded for further proceedings in conformity with this opinion and the practice.

Let the costs of this appeal be taxed against the appellees.

The above may be so certified.

JUSTICE COLLINS concurred.

Reversed and remanded.

ABATE, *versus* RAYMOND, THE PANAMA RAILROAD
COMPANY, Garnishee.

No. 66. Argued January 4, 1910. Decided September 14, 1910.

PROCEEDINGS SUPPLEMENTARY TO EXECUTION.

An affidavit merely reciting, on information and belief, that affiant believes that a third party is in possession of funds belonging to a judgment debtor, or that said third party is indebted to such judgment debtor, in the absence of clear and convincing proof thereof, is not sufficient to justify the entering of a judgment against such third party for the amount of the original judgment against the judgment debtor.

SERVICE OF SUMMONS.

A return stating that service of summons has been obtained upon a foreign corporation, or a nonresident joint stock company or association doing business and having a managing or business agent, cashier, or secretary within the Canal Zone, by personally handing same to an agent of such corporation, nonresident joint-stock company, or association, is not sufficient and a motion to quash such return should be sustained.

Appeal by garnishee from judgment of the Circuit Court of the Third Judicial Circuit; Hon. Lorin C. Collins, Judge.

The facts appear in the opinion.

G. M. Shontz for garnishee, appellant, *C. P. Fairman* for appellee.

WESLEY M. OWENS, J. This is an appeal from the Circuit Court of the Third Judicial Circuit of the Canal Zone. The matter brought to the attention of this court, wherein an appeal was perfected, had its origin in an action of debt upon an open account, wherein A. Balin de Abate, plaintiff, secured judgment against Frank Raymond for \$158.75 and costs. In due course execution was prayed for and issued, and the writ delivered to the marshal, who returned the same endorsed as follows: "No levy made—no goods found liable to levy," or *nulla bona*.

On the 28th day of October, 1909, or approximately two months subsequent to the above-mentioned return of the officer, an affidavit was offered and filed which with its kindred pleadings was denominated by counsel as "proceedings supplementary to execution," and which affidavit alleged that the Panama Railroad Company was indebted to Frank Raymond, the original defendant, and had effects and estate of said defendant in its hands or under its control—that there was danger that the benefit of the said original judgment would be lost to the plaintiff unless proceedings supplementary to the execution were not issued before the return day of said execution. The pleading mentioned concluded with prayer for an order of court directed to the Panama Railroad Company or any officer or member, to appear and answer under oath certain written interrogatories annexed to such pleading. The order of court requested was granted on October 28, 1909, and was directed to Frank Raymond as well as to the Panama Railroad Company. The order carried the efficacy of a summons, and was returnable on November 4, 1909. On the date of return the cause was continued until the 11th day of November, 1909, when counsel for the Panama Railroad Company entered its motion to dismiss the written interrogatories of plaintiff. This motion was denied, and a conditional judgment entered against the garnishee defendant for a sum equal in amount to the original or parent judgment. From the record, it appears that this conditional judgment was entered in the nature of a default and with-

out proof or showing as to any funds or estate of the judgment debtor in the possession or care of the Panama Railroad Company. In making such order the court ruled that the Panama Railroad Company should be given one week to show cause why such conditional judgment should not be made final. On November 18, 1909, with but special or limited appearance noted of record, the garnishee defendant moved the court to quash the return which purported service upon it. This motion the court denied. The company then moved to set aside the order of conditional judgment, which motion was also denied; and the garnishee defendant then offered and filed its answer. The answer denied that at the time of the original service, to wit, October 30, 1909, such garnishee defendant had within the Canal Zone any property, money, or credits of the original defendant Frank Raymond. On November 26, 1909, defendant Raymond filed an affidavit asking and seeking all rights of personal exemption as accorded under section 506, page 113, of the Code of Civil Procedure of the Canal Zone. On December 2, 1909, following a continuance to that date, the proceedings supplementary were called for hearing; the parties litigant were present by counsel. Following the call of the case, the court, of its own motion and without pleading, motion, or request from attorneys or litigants, ordered that the answer of the Panama Railroad Company be stricken from the files, and entered a rule on the garnishee defendant to further answer within one week and show cause why the conditional judgment should not be made final. On December 9, 1909, or at the expiration of the time prescribed, the case was called, and the court ordered that the conditional judgment be made final, for the reason that the garnishee defendant had failed to answer the written interrogatories. This final judgment, following in the footsteps of the one denominated conditional, was entered and ordered in the absence of proof or showing of any nature as to funds or estate of Frank Raymond in the possession or care of the garnishee defendant. From the record, it appears that during the pendency of the entire garnishment proceedings, no evidence was offered and in fact no testimony given of any nature before the court, save and except on November 2, 1909, when one Noltee, agent of the garnishee defendant, with office at Gatun, C. Z., and on whom the purported service as against the Panama Railroad Company had been made, was called by the plaintiff and examined as to his duties and position with the Panama Railroad Company, but in no way interrogated as to his knowledge of funds or estate

of the judgment debtor in the possession or control of the Panama Railroad Company at any time. From the record, it is disclosed that counsel for the Panama Railroad Company noted and preserved an exception to all orders and rulings as above set forth, and when the conditional judgment was made final, entered a motion for a new trial, which motion was overruled, and proper appeal prayed for and perfected to this court.

The process of garnishment, as it obtains in the Canal Zone, is not unlike such action in the United States—that is, a purely statutory proceeding, and unknown in its present form to the common law. With judgment obtained against the principal defendant, the process of garnishment is a proceeding supplementary to such parent action, and not an independent proceeding. The Code of Civil Procedure of the Canal Zone provides, section 515, page 115:

After the return of an execution against the property of a judgment debtor,
* * * unsatisfied in whole or in part, and upon proof, in writing, and by affidavit or otherwise, to the satisfaction of the judge, that a person or corporation has property of such judgment debtor or is indebted to him, the judge may, by an order, require such person or corporation, or any officer or member of the corporation, to appear at a specified time and place, within the circuit in which such person or corporation is served with the order, and answer concerning the same; the service of the order shall bind the property in the possession or under the control of such person or corporation from the time of service; and the person or corporation so served with the order shall be liable to the judgment creditor for all property, money, and credits in his hands belonging to the judgment debtor, or due to him from such person or corporation, from the time of service; and the person or corporation so served with the order shall be liable to the judgment creditor for all property, money, and credits in his hands belonging to the judgment debtor, or due to him from such person or corporation, from the time of service and the judge may also require notice of such proceeding to be given to any party to the action, in such manner as may to him seem proper.

On page 116, section 521, of the same authority, it is further provided:

The judge may order any property of the judgment debtor or money due to him, not exempt by law, in the hands either of himself or the person, or the corporation, to be applied toward the satisfaction of the judgment; but the earnings of the debtor for his personal services at any time within one month preceding the order can not be applied when it is made to appear by the affidavit of the debtor, or otherwise, that such earnings are necessary for the use of a family supported wholly or in part by his labor.

As noted, *supra*, the proceedings denominated “supplementary to execution” were instituted by and from affidavit of counsel for

judgment creditor. On showing made by the affidavit alone, the court issued its process in the nature of a summons, and which directed:

First. That the judgment debtor be and appear before the court on November 4, 1909, and answer concerning any property of which he may be possessed.

Second. To the marshal of the Canal Zone, commanding him to summon the Panama Railroad Company, a corporation, its officers, members, business or managing agent, if to be found within the circuit, to be and appear before the court * * * on the 4th day of November, 1909, then and there to answer unto the judgment creditor as to the rights, credits, choses in action, effects, estate, property or monies in the hands of said Panama Railroad Company, its officers, members, business or managing agents, belonging to the said Frank Raymond, and to answer under oath the interrogatories (hereto) annexed * * *

The interrogatories annexed to said writ were six in number, and purported to interrogate the Panama Railroad Company, etc., as to its possession, charge, or control of any monies, rights, credits, or effects of Frank Raymond at the time service was had.

Following the sixth or last interrogatory, there was a statement directing "all of the above (referring to the interrogatories) to be propounded to and answered by said Panama Railroad Company or its duly authorized officer on or before the return day of the order hereto annexed."

The first assigned error attacks the sufficiency of the affidavit and showing made on which process of garnishment issued, as well as the service had and secured under such writ on the garnishee defendant. It will be observed that the code authorizing the garnishment directs such proof in writing and by affidavit of the possession or control in the garnishee defendant of funds, property, or estate belonging to the judgment debtor, as may satisfy the judge. However liberally this discretion may be interpreted, it is apparent that the law contemplates some tangible proof of the possession of property or estate of the judgment debtor in the possession or control of the garnishee defendant. True, an affidavit satisfies the requirement of law for "proof in writing." (*See Godfrey vs. Newby*, 39 Southwestern Reporter, p. 594.)

But an affidavit defective in not setting forth the requirements of statute is fatal, and confers no jurisdiction, though the garnishee appears. (*Ettleson vs. Fireman's Fund Insurance Co.*, 64 Mich., 331. *Wells vs. American Express Co.*, 55 Wis., 23, 42 Am. Rep. p. 695.)

As before stated, the only showing made as appears of record establishing property or estate of the judgment debtor in the pos-

session of the garnishee defendant, is an affidavit of counsel for plaintiff. As the same constitutes such an important factor in this case, we set forth here that portion of such affidavit as refers to such property:

* * * Affiant further states that the said defendant has no property within the knowledge of this affiant in his possession that is liable to execution, and that affiant has just reason to believe and does believe that the Panama Railroad Company, a corporation organized under the laws of the State of New York, with a business or managing agent stationed at Gatun, Canal Zone, and within the jurisdiction of this court, is indebted to the said defendant Frank Raymond. and has effects and estate of said defendant in its hands or under its control * * *

We hold that this is too indefinite. The proof is not sufficient. Before those who are not parties to an original action should be commanded to appear in court and answer, proof more certain and definite should be offered to the court of property or effects belonging to the judgment debtor and in possession of such third parties. The code contemplates that the judge must be satisfied that the garnishee defendant has such property or estate belonging to the judgment debtor. The showing here is but the belief of the attorney, and that in the absence of any declaration as to the nature of the property, now held, or where located. Under the law above referred to, it must be apparent that the basis of a proceeding by way of garnishment is an affidavit by the plaintiff, his agent or attorney, to the existence of certain facts upon which his right to the issuance of a writ or summons in such proceedings auxiliary is made to depend. All jurisdictions recognize the important relation such affidavit occupies to the proceeding auxiliary. The Texas courts, with a statute allowing such affidavit and bond to be made by the plaintiff or his attorney, have so weighed the importance of such affidavit that they hold that it must be made, and proof furnished, by the plaintiff alone. (*See Givens vs. Taylor*, 6 Tex., 315.)

We do not think the exigencies of the case require so strict a requirement in the matter of furnishing proof upon which process may issue, in this jurisdiction. However, it should be such direct proof as to lead the court to reasonably believe and understand that property or estate of the original defendant is in the possession of those sought to be garnisheed. It will be remembered, *supra*, that the Code requires that "upon proof in writing and by affidavit or otherwise to the satisfaction of the judge" as to property, etc., that an order may be made as to service, etc. To d

complete justice to an innocent party, and especially one in no way connected with the parent litigation, the court should be furnished tangible proof of property belonging to the judgment debtor in the possession or charge of such garnishee defendant. The affidavit in the case at bar is insufficient; no such showing of property as we deem necessary was made.

The purported service of the writ was made on the agent of the Panama Railroad Company at Gatun, C. Z. Counsel for the garnishee defendant, limiting his appearance, moved to quash such return for the reason that it was not shown that service had been made as provided by section 411 of the Code of Civil Procedure of the Canal Zone. The return of the marshal so objected to was as follows:

* * * Served on G. M. Noltee, Agent P. R. R. Co., Gatun, C. Z., by personally handing him a copy of the within process. This at Gatun, C. Z., on the 30th day of October, 1909, at about 3.30 p. m. (Sgd.) Arthur Kennedy, Sergeant No. 3, Zone Police, Deputy Marshal.

The law of the Canal Zone on the question of service, and as mentioned, is as follows:

* * * The summons must be served by delivering a copy thereof as follows: * * *

SEC. 2. If suit is against a foreign corporation or a nonresident joint-stock company or association doing business in and having a managing or business agent, cashier, or secretary within the Canal Zone, to such agent, cashier, or secretary; or to any agent authorized by the corporation, joint-stock company, or association to accept service for it or them.

It will be clearly noted that the objection made to the service must stand or fall on the conclusion reached as to Noltee being a "managing or business agent, cashier, or secretary of the Panama Railroad Company." The information before us, that to which we must look, is the marshal's return, or other established fact of record. From the return, service was had on Noltee, agent. True, evidence was introduced to show Noltee's duties, but from the record, no effort was made to correct or amend the officer's return, or for a finding of court that the term "agent," used by the officer, when interpreted in the light of the evidence offered by Noltee, made such representative of the garnishee defendant a managing or business agent, etc. as the code provides. With the present record before us, and in a proceeding so clearly statutory, we can not conclude that the term "agent," should be made so elastic as to allow an inference that the same included managing or business agent, cashier, or secretary, etc., as provided by the Code.

The service of the writ of garnishment is generally provided for by statute, and when so provided, the requirements of such statute must be observed. (Am. and Eng. Enc. of Law, 2d Ed., vol. 14, p. 756, sec. 4.)

As to manner of service in garnishment, strict compliance with statute is required. Footnotes, *ibid.*, citing: (*Disha vs. Baker*, 3 Ark., 197; *Read vs. Kirkwood*, 19 Ark., 332; *Connell vs. Godfrey*, 22 Penn., 136; *Illinois Central Railroad Co., vs. Brooks*, 90 Tenn., 161; *American State Reporter*, 673; *Enc of Pleading and Practice*, vol. 9, p. 823.)

The return should state all facts essential to a valid service. (Am. and Eng. Enc. of Law, 2d Ed., vol. 14, p. 756, sec. 4, citing many cases.)

* * * Due and proper service must appear on the record or by the officer's return or proof of service and according to statute before the court is authorized to render a judgment by default. * * * *Sabuo vs. Manhattan Life Insurance Co.*, 82 Fed. Rep., 566; *Krubeke vs. Merchants Transportation Company*, 11 Fed. Rep., 283.)

For some purpose apparently in contradistinction with the common term or more liberal position denominated "agent," service was prescribed by the law of the Code of the Canal Zone, in such instances as mentioned in the case at bar, on the managing or business agent. We can not hold that the service in the present instance is sufficient and, therefore, the motion to quash the return should have been allowed. Holding as insufficient the proof of property shown by the affidavit on which order for garnishee summons issued, and likewise directing that the motion to quash the return of service be allowed, the trial court would be devoid of jurisdiction as to any subsequent judgment or order entered.

Other errors are assigned, but as the conclusions of this court heretofore reached dispose of the case, it is unnecessary for us to treat the other questions raised.

It is, therefore, ordered, adjudged, and decreed that the judgment entered in the court below as against the garnishee defendant be and the same is hereby reversed; and that the garnishee proceeding as instituted against Frank Raymond, defendant, and the Panama Railroad Company as garnishee defendant, or proceedings supplementary to execution, be and the same is hereby dismissed, with all costs of this appeal taxed against the plaintiff.

Let the same be so certified.

The CHIEF JUSTICE concurred.

Reversed.

ROME *versus* FAIRMAN.

No. 67. Argued September 13, 1910. Decided November 28, 1910.

ATTORNEY'S FEE.

An attorney has a right to retain such portion of the funds of a client which may be in his custody to satisfy a reasonable attorney's fee for services rendered.

Appeal by defendant from judgment of the Circuit Court of the Second Judicial Circuit; Hon. Wesley M. Owen, Judge.

The facts appear in the opinion.

C. P. Fairman for appellant. *V. F. J. Goldsmith* for appellee.

H. A. GUDGER, C. J. This action was tried in the Second Judicial Circuit, and from the judgment entered against the defendant, amounting to \$150, an appeal was taken to this court. The plaintiff sued for the recovery of \$400 alleged to be due him on account of collection made by the defendant and not accounted for. It appears from the record and the evidence that the defendant was the attorney for the plaintiff in two separate actions hereinafter referred to, and that on account of one of them he collected from the rent of January, 1908, on the Pennsylvania Hotel the amount involved in this action. It is contended that the defendant had no right to this fund or any part thereof by way of attorney's fee, and, in addition, that there was an understanding and agreement between the parties that the fee due to the defendant as attorney should be paid by one Canavaggio, who intervened in one of the causes heretofore referred to.

The defendant in his answer alleges that he performed services for the plaintiff, the reasonable value of which was \$500, and that the amount in question having come into his hands the plaintiff was given credit upon his account for the same. The plaintiff denies that this was a reasonable attorney's fee.

The record in this cause shows that the defendant had charge as attorney of the Pennsylvania Hotel in Empire, property belonging to the plaintiff, and that he was financing the same; that, in order to place the property on a firm footing, he procured a renter for one year for the sum of \$400 gold per month; that he drew and had executed a lease for this purpose, and that the amount paid was the first monthly installment on the same; that

about the time he secured a renter for the property one Toledano, who held a mortgage on the property for the sum of \$7,150 gold, proceeded to foreclose his mortgage, whereupon Canavaggio, who held a second mortgage on said property for \$3,000 intervened. The plaintiff employed the defendant as his attorney in both these suits in addition to the employment heretofore named. The record discloses the further fact that this litigation was finally adjusted and the mortgages consolidated in the second mortgagee, Canavaggio, and that the plaintiff was given two years in which to pay the amount due. In the meanwhile the rents and profits of the hotel were to be credited upon the principal sum. It also appears that in making this agreement one of the mortgages, that held by Toledano, was reduced to \$5,700 on account of an overcharge in interest that had been calculated and included in notes at the date of their execution and which were not yet due.

This compromise was effected by the defendant as attorney for the plaintiff. The terms and stipulations of the same were drawn by him and constituted a long, tedious document requiring a great deal of labor and thought.

It also appeared in evidence from two witnesses who stated that they knew the amount of work that had been done; that they were familiar with each case; and that the services of the defendant in the suits referred to were reasonably worth anywhere from \$450 to \$500. Another expert witness placed the amount at from \$350 to \$450. It will be noted that this last witness, after the trial had ended, and without the knowledge and consent of either the plaintiff or defendant, went to the Judge's chamber and asked to change his testimony from the amount named to an amount on each figure \$100 less. Another witness, who had talked with the plaintiff about the matter and from whom he desired to borrow some money, states the plaintiff told him that the \$400 collected and held by the defendant was the property of the defendant. This testimony was substantially related by another witness, the only difference being that the plaintiff told the other witness that the defendant herein was to settle a few small matters for him.

The defendant states that his services were well worth the sum of \$500, and claims that the plaintiff recognized that the \$400 belonged to him in that he came to him after he had collected said \$400 with the plaintiff's full knowledge and consent, and tried to borrow money from him, and, when refused, tried on another occasion to procure the signature of the defendant to notes for an amount of \$200. The plaintiff, who was a witness in the cause,

does not deny that the defendant rendered him services. He does not deny that the charge made by the defendant was reasonable. He does not deny that he stated to Canavaggio and Tipton that the \$400 belonged to the defendant, but in his evidence he takes the position, and the only position he assumes so far as testimony is concerned, that the amount is not chargeable against him but that attorney Fairman should have collected it out of Canavaggio, the intervener, and had him charged up on the \$2,500, amount advanced to settle the outstanding claims against the plaintiff. It will be remembered also that the litigation with regard to this property covered a period of more than 12 months; that by virtue of the settlement the defendant saved to the plaintiff the sum of \$1,400 in interest; that he procured an advancement of \$2,500 to pay certain pressing outstanding claims against the plaintiff; and that he had the time extended on each of the mortgages which had been forfeited for a period of two years. There is not anywhere in the record or in the testimony of the plaintiff, or any other witness, one single denial of all these facts.

The court below did not pass directly but in substance found, upon this view of the plaintiff's claim, that the defendant was not necessarily bound to charge the amount up to the \$2,500. There was certainly no error in this nor the suggestion of exception. The court further found that according to the testimony in the case, and the further consideration of the record testimony and the witnesses on the stand, and only these, that the charge made by Fairman of \$400 was not a reasonable charge.

In order to consider this question we should take the state of facts proved. The question is what it would have been worth to have taken as attorney the management of the Pennsylvania Hotel, procured a renter for the same, and to have drawn a contract by which the owner of that property would receive nearly \$5,000 as rental per year. In the next place, what was it worth to defend in a foreclosure mortgage suit where the sum involved was \$7,150. Next, what was it worth to have defended in the additional matter where an attempted foreclosure of a mortgage was made and where the sum was \$3,000, and what was it worth to undertake to arrange and make an agreement upon the matters involved by which the defendant could be extricated from a fearfully embarrassing position, not only given time of two years to pay the amount, but have deducted from same the amount of \$1,400 in interest, and, in addition, get \$2,500 to pay outstanding claims against him that seemed to be vital so far as his financial

affairs were concerned. Take all this and this alone, as shown by the record in the case, and as not controverted, would a fee of \$400 be considered unreasonable? In addition, however, to the above Mr. Rome himself goes on the witness stand and admits the employment, the work done by the plaintiff, and simply says in answer that whatever he did and whatever was due him was to be charged to another fund. Does he allege that the amount is unreasonable? There is not one single syllable in his testimony or any testimony he introduced, record or otherwise, that looks as though he meant to make a contest on that point save and except his answer in the case. In addition, however, to the record testimony, and the testimony of the plaintiff and defendant, two witnesses go on the stand who are thoroughly familiar, as they say, with all the work done by the defendant, and fully sustain his contention, while other witnesses go on the stand and show that the plaintiff himself ratified and confirmed not only the retention of the \$400 by the defendant but the fact that the charge made was reasonable in character. It may be contended that one of the expert witnesses changed his testimony.

The record does show this, and the same record shows that neither the defendant nor plaintiff knew anything about it; that it was not done in open court. It is not to be supposed that the Judge who tried the cause would have given a moment's consideration to corrected testimony made in such a way. If he did then the court erred. From all the testimony in the case it seems to us that the charge as made by the defendant, as attorney, against the plaintiff is reasonable and that the work performed is worth the sum of \$400; that the defendant had the perfect right to credit his account with that amount; and that the court below erred in entering up judgment against the defendant for the sum of \$150.

It is, therefore, ordered, adjudged, and decreed that the judgment of the court of the Second Judicial Circuit be and the same is reversed; that this case be remanded to the court below; and that the action be dismissed.

JUSTICE COLLINS concurred.

Reversed.

WILKINS *versus* SAMUDIO.

No. 68. Argued September 12, 1910. Decided December 1, 1910.

HUSBAND AND WIFE.

An action of debt decided adversely to a party under judgment in which action execution issues against realty held in the name of such party is not *res adjudicata* as to the wife of such party to such an extent as to preclude her from subsequently asserting title to the property even after it shall have been sold under levy of execution.

Appeal by plaintiff from judgment of the Circuit Court of the Second Judicial Circuit; Hon. Wesley M. Owen, Judge.

The facts appear in the opinion.

Sam B. Dannis for appellant. *Hinckley and Ganson* for appellee.

H. A. GUDGER, C. J. In the Second Circuit Court suit was begun by the plaintiff against the defendant for the recovery of certain property situated in the town of Empire and fully described in the complaint. The allegation, in brief, as contained in the complaint, is that the plaintiff is the bona fide owner and entitled to the possession of the property in question; that the defendant is in the unlawful possession of the same and that he holds said property by virtue of a sale made by the marshal of the court, and that at the time of said sale and prior thereto the property was owned by the plaintiff, and that the purchaser, Santiago Samudio, had full knowledge of the claim of the plaintiff.

To this complaint the defendant filed an answer in the nature of a plea in bar in which he sets up the fact that there was a suit between Jacob Wilkins, husband of the plaintiff herein, and Arias & Company, and that when the property levied on as the property of Jacob Wilkins was about to be sold on a judgment obtained in favor of Arias & Company the plaintiff, Henrietta Wilkins, filed a petition asking that an injunction issue against the marshal of the court to restrain him from selling said property, alleging that the property was her sole and separate property; that at the hearing of this application for an injunction proof was introduced by both parties, and the Judge decided the matter in controversy adverse to the plaintiff, Henrietta Wilkins—that is, refused to restrain the sale; and that, therefore, this was *res*

adjudicata and asked for dismissal of the action. The court sustained the contention of the defendant and ordered the case to be dismissed, from which the plaintiff appealed.

In order to understand better the exact situation, it will be noted that in the suit begun by Arias & Company against Jacob Wilkins, the husband of the plaintiff, the question at issue was an alleged indebtedness of \$1,876.06. In that action judgment was duly rendered and execution issued thereon and the property in question levied on by the marshal of the court as the property of the judgment debtor. After the final judgment had been rendered in the case of Arias & Company *vs.* Jacob Wilkins, and execution duly issued thereon by the clerk of the court, and the levy made as above set forth, Jacob Wilkins was cited before the court for contempt, and the plaintiff, Henrietta Wilkins, filed an injunction asking that the marshal be restrained from selling the property, making the allegations that have been heretofore set forth. After the dismissal of the injunction the property was sold at public auction, and is alleged to have been purchased by the defendant, Santiago Samudio, and the plaintiff brought this action.

The sole question for this court to consider is whether or not Henrietta Wilkins, the wife, was a party to the suit between her husband, Jacob Wilkins, and Arias & Company and, therefore, bound by the record and orders made in that case.

Pending the litigation and at the date of final judgment there is no claim that she was such party. It is contended, however, that the fact that she filed an injunction against the marshal of the court to restrain him from selling property claimed by herself, and upon the grounds set forth, made her a party at least to the extent that the decision of that matter relating to the injunction was *res adjudicata* of all her rights and applicable to the present case. We do not concur in that view of the question and, therefore, are of opinion that the court erred in sustaining the plea in bar. To this end an order has heretofore been made reversing and remanding this case.

JUSTICE COLLINS concurred.

Reversed and remanded.

GOVERNMENT OF THE CANAL ZONE *vs.* FELIX.

No. 69. Argued August 10, 1910. Decided October 4, 1910.

ASSAULT WITH A DEADLY WEAPON.

The defendant went to the house of the complaining witness and, after engaging in a heated conversation, advanced upon him, stating he would shoot his head off, and at the same time leveling a double-barreled shotgun at him, cocked both barrels and then pulled both triggers; but the gun failed to explode. Held that the crime of assault with a deadly weapon had been committed even though the gun did not explode. If the defendant made the unlawful attempt to do a violent injury to another and had present ability; the failure of his attempt can be of no avail to him.

CRIMINAL INTENT.

If a miraculous intervention alone saves injury, nevertheless there may be a present ability to commit crime; and one knowing he had the present ability and the criminal intent the crime is complete.

Appeal by defendant from verdict of guilty of the Circuit Court of the Second Judicial Circuit; Hon. H. A. Gudger, Judge.

The facts appear in the opinion.

MacIntyre and *Rogers*, for appellant. *W. K. Jackson*, for the Government of the Canal Zone.

LORIN C. COLLINS, J. Information was filed against the defendant in the Circuit Court of the Second Judicial Circuit on June 7, 1910, charging the defendant with having committed an assault with a deadly weapon loaded with powder and bullets in and upon the person of Antonio Earnest.

The defendant was found guilty and sentenced to three years in the penitentiary.

The evidence showed that the defendant came to the house of Earnest and, after engaging in a heated conversation, advanced upon Earnest, telling him that he would shoot his head off, and at the same time leveling a double-barreled shotgun at him, cocked both barrels and pulled both triggers; but the gun failed to explode.

The gun was introduced in evidence, and was found to contain two cartridges loaded with shot and powder. The cartridges showed the dent made by the hammer of the gun. It was admitted that the gun was a dangerous and deadly weapon and that Earnest was within near range.

The cause is appealed to this court on a pure question of law. The contention is made that, though the gun was a deadly and dangerous weapon, loaded with shells containing powder and shot, pointed at a man within range and both barrels tried to be exploded by the defendant, that, as the gun did not go off, there was no present ability on his part to commit a crime and, therefore, there was no assault. Our Penal Code defines an assault as follows:

An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another. (Sec. 178.)

The same code in section 11 reads:

In every crime or public offense there must exist a union of joint operation of act and intent or criminal negligence.

When an act embraces a criminal intent and the person making such attempt uses every agency at his hand to do another a violent injury and his plans are frustrated only by a singular providence or a miracle, the benefit of such miraculous interposition should be extended to him who is saved and should not accrue for the sole benefit of the guilty one.

In saving the accused from heavier punishment the law is extremely liberal and there should be no further leniency shown. A man makes an attempt to shoot another and discharges his weapon, but a bystander interferes and the shot goes wild. Has not an assault been committed?

Therefore, if a miraculous intervention alone saves injury, it seems to the court that there was a present ability; and, the accused knowing he had the present ability and the criminal intent, the crime is complete and the statute is fully met.

In the case at bar, surely so far as the defendant was concerned, his present ability must be determined with reference to the means at his hand and not by the failure of his attempt.

The confusion which has existed among the reported cases and the text-writers in regard to this much-discussed definition comes from connecting present ability with abortive results instead of with the defendant as he stood before and at the time of the attempt.

The crime is complete if the accused made the unlawful attempt to do a violent injury to another and had present ability; the failure of his attempt can be of no value to him.

Let the cause be affirmed.

JUSTICE OWEN concurred.

Affirmed.

CANAL ZONE *ex rel.*, W. H. KNOX & COMPANY *versus*
GOOLSBY.

No.71. Argued August 8, 1910. Decided August 23, 1910.

PROPERTY IN CUSTODIA LEGIS.

A sum of money in the possession of the proper officer of the court is in custodia legis, and being so held is not subject to a claim or demand of any kind or nature except when made the subject of direct attack in a proper proceeding.

MANDAMUS.

There being nothing other than a ministerial act required to put one in possession of a fund which is in custodia legis, and there being no jurisdiction on which judicial discretion could be based, a peremptory writ of mandamus will not issue.

Petition for writ of mandamus filed by W. H. Knox & Company.

The facts are stated in the opinion.

E. M. Robinson and *W. H. Carrington* for relator. Relator not represented by counsel. *Hinckley* and *Ganson* and *Sam B. Dannis* for intervening petitioners.

LORIN C. COLLINS, J. This cause being called for trial come the parties by their attorneys respectively. And the evidence having all been heard and the court, having heard the arguments of counsel, took the said cause under advisement. And the court, being now fully advised in the premises, finds:

That there were in the hands of E. M. Goolsby, Clerk of the Circuit Court of the Second Judicial Circuit at the time that the rule to show cause was issued in this case, the sum of four thousand four hundred and thirty-four dollars (\$4,434);

The said sum was the proceeds of an execution issued in the cause of William H. Knox & Company *vs.* M. Succari on a judgment duly entered in the said court;

That on June 10, 1910, the said sum of money was in the hands of the marshal of said court as the result of the sale of certain goods and chattels of the said judgment debtor;

That on said day said money was not subject to any lien or claim of any person or persons whomsoever other than the judgment creditor;

That on June 10, 1910, the said court of the Second Judicial Circuit entered an order on the marshal of said court to turn the said money over to the respondent as clerk of said court to hold subject to the further order of the court..

That said fund of money when so turned over to the clerk of said court was in custodia legis and being in such custody could not be subject to any claim or demand of any kind or nature except when made the subject of direct attack, in a proper proceeding;

That there was not on June 10 aforesaid, and is not now any lien, right, title, or interest in any person or persons whomsoever in or to said fund other than the relators;

That the intervening petition of the Tropical Trading Company and of the Rice Stix Dry Goods Company are not based on jurisdictional or legal grounds.

That as there is nothing other than a ministerial act required to put the relator in the possession of said money and there being no jurisdiction on which judicial discretion could be based;

Therefore, it is considered by the court that a peremptory writ of mandamus do issue herein commanding the respondent forthwith to pay to the relators or their lawfully and duly recognized attorneys the sum of four thousand four hundred and thirty-four dollars (\$4,434) now in his hands by order of court entered in the cause of William H. Knox & Company *versus* M. Succari on June 10, 1910, and to credit the said amount on the judgment in said cause.

It is ordered that title of said cause be changed to conform with the title in this order.

It is further ordered that the intervening petitions of the Tropical Trading Company and the Rice Stix Dry Goods Company be dismissed at the costs of the petitioners and the costs of this proceeding be taxed against the relators.

The CHIEF JUSTICE concurred.

Writ denied.

CANAL ZONE *ex rel*, SUCCARI *et al. versus* OWEN.

No. 72. Submitted September 12, 1910. Decided September 17, 1910.

MANDAMUS.

Mandamus will not issue against a judge of a trial court for his refusal to sign a bill of exceptions which shows on its face is of no effect nor could be of any benefit to party applying for same even though facts as therein stated might be true.

JUDGMENTS. TERMS OF COURT.

After a term of court has passed the court loses all control over an ordinary judgment rendered at such term when certain conditions exist. Terms of the Circuit Courts within the Canal Zone are from month to month.

APPEAL BOND.

A cause may be reviewed by the Supreme Court at any time by bill of exceptions without bond. The judgment of the lower court, in such cases, will not be stayed, but the case may be presented for review and a judgment creditor compelled to assume the risk of reversal. (Slightly amended by Rules and Regulations of the Supreme Court, effective February 25, 1911, p. 27.)

Petition for writ of mandamus to issue against Wesley M. Owen, Judge of the Circuit Court of the Second Judicial Circuit, commanding him to sign a bill of exceptions.

The facts appear in the opinion.

MacIntyre and *Rogers* for relator. *Hinckley* and *Ganson* for respondent.

LORIN C. COLLINS, J. This case comes on a petition for a writ of mandamus to issue against the respondent as Judge of the Circuit Court of the Second Judicial Circuit commanding him to sign a bill of exceptions.

The petition avers that a decree of foreclosure was entered against the relators on March 4, 1910. That on May 14, the defendants appeared by their attorneys and moved the court to vacate the judgment of the court, set aside the decree, and open the default. That on May 23, 1910, defendants' motion was overruled by the court, to which ruling the defendants duly excepted.

That on May 27, 1910, defendants filed a motion for a rehearing of said motion to set aside the decree and that on May 31, 1910, said motion was by the court overruled, to which ruling defendants duly excepted and gave notice of appeal.

That a bond of \$8,000 was required, which on June 2, was reduced to \$5,000 and additional time given to present a bill of exceptions. That on September 2, 1910, within the time fixed, the court refused to sign the bill of exceptions presented by the relators, assigning as a reason therefor that the stay bond had not been given.

This it is claimed entitled the relators to the writ prayed for. The petition has attached thereto as an exhibit the bill of exceptions presented to the court.

The answer for the respondent is very full and complete and gives a detailed account of the litigation to which reference will be made.

From the whole case it appears that the bill of exceptions is to save the exception taken to the ruling of the court, made on May 23, overruling the motion to vacate the judgment, set aside the decree, and open the default.

If the court had lost control of the judgment prior to May 14, and was powerless to set the same aside though he might so desire, then for the purposes of this application the bill of exceptions would become and be an idle and useless encumbrance of the record and should not be granted.

Seymour *vs.* Andrade, Supreme Court Reports, page 19, gives the law of this court in such case. It is there said:

An action of mandamus is an original suit of a civil nature brought in the name of the State on the relation of one who can show a well-defined right thereto. The petition must be very explicit, giving all the facts and circumstances and must be made on affidavit, as it prays an extraordinary remedy. The writ of mandamus will be granted by a superior court only when the substantial rights of the appellant are prejudiced in the lower court, and only when the appellant is unable to obtain redress in any other way.

In the case at bar there seems to be no substantial injury done the appellant, as the matter of permitting attorneys to practice is at the discretion of the court.

There is no rule of practice better established than that after the term has gone by, the court loses all control over a judgment except when certain conditions exist, none of which are existent in the case at bar. The judgment we learn from the petition was rendered in the March term of court. It was the May term of the court before any motion was made to vacate the same. It appears that \$400 should have been credited on the judgment at the time it was rendered, which was afterwards done. So as to this \$400 there is no substantial injury done even though it could not now be considered.

It further appears from the bill of exceptions that \$600 was paid after the judgment was rendered, but this has also been credited on the judgment.

Where money has been paid after judgment, a motion duly made in court at any time will obtain the crediting of the payment on the judgment. No bill of exceptions or appeal is required in such case unless the court refuses to make the proper credit, which was not true here.

It appears from the petition, the answer and the exhibits attached thereto, that it would be of no value to the relators to have the bill of exceptions they present signed, or any other based on the same facts.

This court could not consider any of the questions raised and should the case be brought here by bill of exceptions would be compelled to dismiss it for the reasons given.

In so deciding we desire it understood that the court is of the opinion that a case can be reviewed in the Supreme Court at any time by bill of exceptions without bond. The judgment of the court would not, of course, be stayed, but the case could be presented for review and the judgment creditor would be compelled to assume the risk of reversal.

Section 136, C. C. P., most clearly points out the remedy by bill of exceptions and in accordance therewith the motion of the relators came too late.

The judgment or decree, whichever it was, had become a finality and the court could not, had it so desired, have changed or altered the same in the manner that relators request.

For the reasons given let the writ of mandamus be denied and the petition dismissed at the cost of the relators.

The CHIEF JUSTICE concurred.

Dismissed.

CANAL ZONE *ex rel*, SEIXAS *versus* GUDGER.

No. 73. Argued October 23, 1911. Decided November 27, 1911.

MANDAMUS.

Motion to quash alternative writ of mandamus will lie, even after same has been granted, when it is shown that no bill of exceptions was prepared and presented to trial court for signature.

APPEAL.

In the case of ordinary civil actions the method specifically provided by the Code of Civil Procedure (Sec. 136), for bringing a judgment of the Circuit Court before this court for review is by bill of exceptions, which must be tendered to the Judge of the Circuit Court for certification by him.

ORIGINAL JURISDICTION IN MANDAMUS.

This court may in the exercise of its original jurisdiction issue writ of mandamus to the Circuit Courts and the judges thereof, whenever said courts or the judges thereof unlawfully neglect the performance of a duty which the law specifically or specially enjoins as a duty imposed upon such courts or judges. The writ being in the nature of an extraordinary remedy, the court has no authority to issue same except on such authority as is specifically conferred by law.

Motion to quash alternative writ of mandamus issued against Hon. H. A. Gudger, Judge of the Circuit Court of the Second Judicial Circuit.

The respondent appeared in his own behalf. *C. P. Fairman* for relator.

THOMAS E. BROWN, JR., J. This cause comes before the court on a motion to quash the alternative writ of mandamus heretofore issued.

It appears from the petition of the relator that on or about the 12th day of October, 1909, in an action then pending in the District Court of the District of Gorgona, judgment was granted against the relator in favor of the United States of America by which said judgment it was adjudged that the United States, the plaintiff in said action, should recover of the relator, defendant in said action, certain lands and premises situated in the Administrative District of Gorgona, which said lands and premises were alleged in said action to have been unlawfully and forcibly detained by the relator from the said United States.

Thereafter an appeal was taken by the relator herein, defendant in said action in the District Court, to the Circuit Court of the Second Circuit. Such proceedings were had in the Circuit Court, that on or about the 21st day of December, 1909, judgment was rendered in the Circuit Court in effect affirming the judgment of the District Court, and on January 4, 1910, as the petition herein alleges, the defendant, relator herein, prayed an appeal from said judgment to the Supreme Court of the Canal Zone, which said prayer was on the 5th day of February, 1910, denied by the acting judge of the said circuit, the respondent herein.

Thereafter the relator, defendant in the court below, sued out a writ of certiorari in this court and the same coming on to be heard at the July, 1910, term of this court, said writ was quashed.

On the 14th day of September, 1910, the relator, defendant below, obtained from this court an alternative writ requiring the respondent herein to show cause why mandamus absolute should not issue directing him to forthwith grant the relator the appeal to the Supreme Court of the Canal Zone theretofore prayed by him.

The respondent in the proceeding now before the court prays that the alternative writ of mandamus heretofore granted be quashed, alleging among other allegations of his answer that no bill of exceptions was prepared and presented by the relator to the trial court in order that the appellate jurisdiction of the Supreme Court might attach; that the issues in this case have been passed upon by this court in the matter of the relator's application for a writ of certiorari, and that from said proceedings in the matter of relator's application for writ of certiorari this court has judicial notice of the fact that no bill of exceptions was prepared and presented by the relator.

In its opinion filed in the matter of the motion to quash the writ of certiorari, heretofore referred to, this court stated as follows:

The petition contains no averment that the exceptions taken at the trial¹ or to the ruling of the court in denying the appeal to this court were preserved by bill of exceptions * * * . The very full and complete exhibit of the respondent does not help the plaintiff in error as it shows that nothing was done to preserve for this court the exceptions made in the court below, and that there was a total failure to exhaust clear legal remedies.

It does not appear from the petition in the present proceeding that any different state of facts exists from that referred to in the foregoing quotation from the opinion of this court. There is no

allegation that the relator tendered any bill of exceptions to the respondent herein at any time, the only averment in that regard being that the relator prayed an appeal which prayer was denied.

In the case of ordinary civil actions the method specifically provided by the Code of Civil Procedure for bringing a judgment of the Circuit Court before the Supreme Court for review is by a bill of exceptions, which bill must be tendered to the Circuit Judge for certification by him (Sec. 136, C. C. P.). There are no specific provisions in the Code of Civil Procedure with reference to perfecting appeals, except certain provisions in connection with appeals in special proceedings, nor is there any provision with respect to motions for the allowance of appeals, nor does the code specifically enjoin upon the trial judge any duty regarding either the allowance or disallowance of appeals as such. It is evident, therefore, that even if as contended by the relator he was entitled to have the judgment of the Circuit Court reviewed by the Supreme Court, his petition for a writ of mandamus fails to show that he took or attempted to take the proceedings provided by the code to obtain such review.

Section 552 of the Code of Civil Procedure provides that the Supreme Court may in the exercise of its original jurisdiction issue writs of mandamus to the Circuit Court and judge thereof, "wherever said court or judge unlawfully neglects the performance of a duty which the law specifically or specially enjoins as a duty imposed upon such court or judge." And the writ of mandamus being an extraordinary remedy, it is clear that the court has no authority to issue the same except such authority as is specifically conferred by law.

Since, therefore, the petition herein fails to show, that the relator made any proper attempt to perfect his bill of exceptions and since it also fails to show that the respondent unlawfully neglected the performance of any duty specifically or specially enjoined upon him as acting judge of the Circuit Court for the Second Circuit, it is considered by the court that the alternative writ heretofore issued should be quashed, that the stay granted therein should be vacated and the petition dismissed with costs against the relator. It is so ordered.

JUSTICE JACKSON concurred.

Affirmed.

REECE *versus* SHAY.

No. 76. Argued April 24, 1911. Decided May 19, 1911.

SLANDER.

An action for slander can be maintained in the Canal Zone.

Appeal from Circuit Court of the Second Judicial Circuit;
Wesley M. Owen, Judge.

MacIntyre and *Rogers* for appellant. *Hinckley* and *Ganson*
for appellee.

GUDGER, C., J. This action was heard by the presiding judge of the Second Judicial Circuit, and from a judgment rendered by him sustaining the demurrer and dismissing the case from the docket an appeal was taken to this court.

According to the record, two questions are presented for the consideration of the court:

First. Can an action for slander be maintained in the Canal Zone?

Second. If so, does the complaint state facts sufficient to constitute a cause of action?

The first question was settled in the affirmative by the Supreme Court of the Zone in the case of *MacDougall vs. McLean*, heard in the January term for 1909. In that case the plaintiff brought a civil action against the defendant for malicious prosecution, and founded his right of action on the same principles of law as those which form the basis of an action for slander. In the case referred to, the court, after considering all questions, was of opinion that the law was ample to justify a verdict for damages, and this opinion, delivered by his Honor, Wesley M. Owen, was concurred in by the entire court. A careful study of the subject will show that slander, malicious prosecution, libel, false imprisonment, etc., belong to the same class of civil actions, and that a principal once settled in one applies with equal force to any of the others. In addition to this, however, it may be stated, as has been stated heretofore by this court, that the laws of Colombia regulating civil matters which were in force on February 26, 1904, and have not been modified or repealed, are still in force in the Zone. The fundamental law which existed at the time conferred upon every citizen, protection of "life, honor, and property." Pursuant to this, it was enacted, "He, who shall have been guilty of an offense

or fault which has caused another damage, is obliged to repair it." And again, "It is slander to voluntarily and falsely impute to another the commission of that which, if true, would make him liable to penalty or even might result in dishonor, odium, or contempt in the town or community in which the offense is committed," and "whoever is guilty of slander may at any time be relieved of the penalty imposed by making satisfaction acceptable to the one slandered."

Referring to the laws of the Canal Zone on this subject, it will be noted that in act No. 1, section 24, which confers jurisdiction on the various courts, the Circuit Courts are given jurisdiction in all actions "where the subject of litigation is not capable of pecuniary estimation." This embraces and gives jurisdiction over all kinds of torts, inclusive of such as slander, malicious prosecution, false imprisonment, libel, etc. To further emphasize the subject, the Code of Civil Procedure enacted for the Zone in 1907, in Chapter III, prescribing the limitation of civil actions, after enumerating various and sundry subjects, provides, in section 42, that an action for "injury to person, actions of libel and slander for assault, battery, malicious prosecution or false imprisonment or for injuries resulting therefrom," etc., shall be barred if not prosecuted within one year.

The second question needs very little discussion. The jurisdiction of the court to entertain slander was the principal point made at the hearing below, and it is just possible that if this second question had been the only one at issue, the case would not have come to this court. The complaint very clearly sets forth that the defendant charged the plaintiff with being drunk, with having gone to the house of Mr. ———, with having chased the latter's wife while she was shouting "I won't, I won't" and crying and screaming, saying, "I can't, I can't," and that the defendant meant to charge and did charge, and was understood by those present as charging, that in this act the plaintiff attempted to commit the crime of adultery and rape; which was a false and malicious publication, to the plaintiff's damage in the sum of \$2,500.

It is well settled that a statement of a cause of action in a complaint demurred to on the ground that it does not state facts sufficient to constitute a cause of action, shall be passed upon by the court as though it were true (Code of Civil Procedure, p. 21, sec. 84). Applying this rule, we are of opinion that the complaint does state a sufficient cause of action. It would be neces-

sary, of course, for the plaintiff to prove at the trial below, the facts set forth in the complaint, and also to clearly show the correctness of the innuendo.

Referring to the question of the protection of a man's character and reputation, we can see very little more reason for a law to protect life, and less reason for a law to protect property, than for one to protect a man's reputation. Certainly the honor of the individual is next to his life. It would be a deplorable state of affairs in the Canal Zone if it were to be understood that anyone could go around with impunity and circulate false, slanderous, and malicious reports, either directly or by implication or insinuation, with regard to another, and thereby injure that other's good name and standing in the community and subject him to the ridicule and contempt of all good citizens, and yet not be amenable to any law, or compelled to make redress for the offense.

It is, therefore, ordered, adjudged, and considered that the judgment of the court below be reversed, and the case restored to the trial calendar to be proceeded with according to law.

Reversed.

CANAL ZONE vs. LOUGH.

No. 77. Argued February 6, 1911. Decided February 21, 1911.

MANSLAUGHTER.

A railroad engineer who disregards signals established by rule of the company for which he is working and thereby handles his train in so negligent a manner as to kill a person rightfully on the railroad tracks is guilty of manslaughter.

Appeal from the Circuit Court of the Third Judicial Circuit; Hon. Lorin C. Collins, Judge.

C. P. Fairman and Carrington and Todd for appellant. *W. K. Jackson* for appellee.

GUDGER, C. J. The defendant in this case was tried in the Third Judicial Circuit for criminal negligence, and a verdict of guilty entered against him for manslaughter, and an appeal taken to this court.

The record shows that the grounds upon which the appeal was asked and granted were as follows:

- 1st. Because the verdict was contrary to the law.
- 2d. Because said verdict was contrary to the weight of the evidence; and

3d. Because since the trial defendant has discovered new and material evidence which was not known and which could not, with due diligence, have been known at the date of the trial.

Defendant Lough was an engineer operating an engine on the Panama Railroad, and left Mount Hope in the Canal Zone on train No. 657 on the evening of August 15, 1910, the train of cars being 17 in number and rather heavily loaded. Train No. 661 was 10 minutes ahead of No. 657 and had pulled up close to Bohio station and about come to a standstill on account of some danger in front, when the flagman was sent back to flag any trains which might approach from the direction of Colon, both of these trains being headed south in the direction of Panama. The flagman went back to what is known as the mango trees, which were from 700 to 2,000 feet from the rear of the end of train No. 661, and there placed two torpedoes some distance apart, and then coming back in the direction of his train at Bohio placed a third torpedo. During the time he was out the engineer of train No. 661 blew the whistle calling in the flagman. He not having appeared as soon as was expected he was called by a second whistle from the engineer of No. 661. The flagman had gone within a distance of some 30 or 40 yards to the rear end of train No. 661, and was standing near the track with his flag in hand and flagging when train No. 657 passed him and ran into the caboose of train No. 661, and in the general wreck the conductor of train No. 661, one Elias C. Tinsley, was killed. The evidence of all the witnesses showed clearly that the two torpedoes were exploded at the mango trees and that they exploded when the engine passed over them, and that the engineer, the defendant, recognized the fact by two blasts of the whistle. There is evidence also that one torpedo also exploded, though some of the witnesses say they did not hear it. There is some discrepancy as to the speed of the train when the torpedoes at the mango trees were exploded, some of the witnesses saying it was running at the rate of about 40 miles an hour, while others said it was running at the rate of about 25 or 30 miles an hour. Whatever was the speed of the train at that time the evidence on the part of the Government shows that the defendant made no effort to slacken the speed of his train, and did not do so until he discovered just in front of him the caboose into which his engine plunged and which caused the death of Tinsley. At this time he put on the emergency brakes and did all he could to bring his train to a standstill, but it was too late to prevent the accident.

The evidence shows that the two signals at the mango trees were danger signals, and that by their explosion it was indicated that there was danger ahead, and that the speed of the train should be slackened. The defendant contends that this rule does not mean that the train shall be slackened to such an extent that he shall have control of the same, or to such an extent that he could stop it within vision. The rule of the company, No. 15, states as follows:

The explosion of one torpedo is a signal to stop. The explosion of two not more than 200 feet apart is a signal to reduce speed and look out for a stop signal.

According to the evidence of the Government the two torpedoes were exploded, and afterwards the one torpedo, being the stop signal, was also exploded, and yet, up to this time, there was no effort upon the part of the defendant to materially reduce the rate of speed, nor place on the emergency brakes, as under the circumstances it seems he clearly should have done. There is also a slight amount of evidence tending to show that the defendant, on the occasion referred to, was under the influence of intoxicants, and also tending to show that he was not on the alert; that he was not looking in the direction where danger might be expected; that he was in fact sitting in his engine with his head down, leaning on the sill of the window, and his face resting on his hands, and in such a position that he could not possibly see anything in front of him. One witness at least swore not only to the fact that he had been drinking but to the fact that he occupied the position named, and to the fact that he warned him that there was danger ahead, to all of which the defendant paid no attention. This view, however, was stoutly denied by the defendant. The defendant avers that he was not intoxicated; that he did not occupy the position described by the witness, with his face down in his hands, but that, on the contrary, he used due diligence and caution; but the court below seems to have taken the view of it against the defendant, and it is not the province of the Supreme Court to reverse a ruling under such circumstances unless it should find that the testimony considered by the court, and upon which the court based its judgment, was not sufficient in law to sustain the verdict. There was an abundance of testimony introduced in the court below justifying fully the conclusions of the court on the question of guilt, and as that court had the best opportunity of weighing the testimony of witnesses, and concluding as to just how far the one or

the other should be believed, and as that duty especially devolves upon the Circuit Court and not upon the Supreme Court, this court can not, on a matter where there is such contradiction, disturb the verdict. The court below could see the witnesses, note their demeanor, was cognizant of all the surrounding circumstances, and, therefore, was in a better position to be able to judge as to the weight of the testimony than an appellate court can possibly be. The appellate court under such circumstances will interfere only when there is no testimony to support the verdict, or when the testimony is so slight that it is manifestly not sufficient to justify a court in convicting a defendant. The special province of the Supreme Court is to pass on questions of law, whereas the special province of a Circuit Court is to pass on facts in connection with law and the latter is reviewable by the Supreme Court. We, therefore, lay it down as a rule that where the testimony is contradictory the judgment of the court below will not be disturbed provided there is evidence enough given to sustain such verdict.

With regard to the third objection as to the discovery of testimony, it is only necessary here to state that the motion for a new trial on that account was, in our opinion, incomplete. There were four affidavits introduced by four engineers, each one of whom stated that they knew witness Owen, and that they knew he was not an expert. There was no averment that his evidence was not correct, nor did they pretend to allege that in case a new trial were granted they would introduce witnesses who would depose to facts materially different from the statement made by this witness. Hence, we do not see that it has any application in this case. Further, with regard to Rule No. 15, it seems obvious that when the engineer passed over the two torpedoes (and his own testimony shows that this was done), it was his duty to have placed his train in such condition as to have been able at least to have controlled it within a very short distance. It would be idle to say that a danger signal, such as the explosion of the two torpedoes, should be given, which commanded the engineer to slacken speed and look out for a stop signal, and then to take the position that such did not require of him to place himself in command of the dangerous machinery which he operated; so that, if witness Owen's testimony were entirely excluded, it still left the defendant, in our judgment, guilty of criminal negligence in that he failed to observe that due caution which was necessary under the circumstances. In truth and in fact, if you believe the testimony offered by the Government, he was grossly guilty of criminal negligence.

It is, therefore, ordered and adjudged that the judgment and verdict of the court below be affirmed, and that this case be remanded with instructions that the court proceed according to law.

Affirmed.

CONCURRING OPINION OF JUSTICE OWEN.

I concur in the order of affirmance, but in so doing my view of the testimony is such that I do not believe the defendant "grossly" guilty of criminal negligence. True, the courts of some jurisdictions have announced the rule—"Gross negligence is only ordinary or simple negligence." *Grilly Collier Co.*, 12 Jur., N. S. 727—but the term is doubtless to be understood as meaning a greater want of care and a more wanton and reckless disregard for duty than is implied in the general term of "criminal negligence." From my view of the law and testimony there is sufficient evidence to support the judgment of the trial court and as announced in the opinion of the Chief Justice, an appellate court will not disturb the judgment of a trial court, when the question in dispute or difference, is as to the preponderance of testimony or its relative weight. However, I do not find in the record such evidence as would support the theory that the defendant was grossly guilty. True, one having in charge and under his control such dangerous agencies as locomotives, should be held to the very highest regard for duty and service, but in the case at bar the question and evidence of intoxication must be of slight or no moment or consequence as the only evidence offered by the appellee, attempting to charge or establish drunkenness was from the fireman who also said he did not see the defendant take a drink or smell liquor on his breath. The defendant denied in toto that he had taken a drink of intoxicating liquor that day. We next pass to the duty and action of the defendant just prior to the moment of danger. Conditions are represented in one way by the fireman and earnestly denied by the defendant. As to the obedience of Rule 15 of the railroad company, we find that it was not as to the slight or total ignorance of such rule wherein the defendant is charged with being derelict, but his failure to properly interpret the same according to the understanding and meaning placed thereon by the expert, that caused the trial court in his consideration of the issues to find that the weight of testimony was sufficient to sustain the charge of the government and find the defendant guilty as alleged in the information. However, in our mind the evidence failed to disclose such a total

disregard for duty—intoxication at the post of duty; ignorance of rules and a failure or no attempt to bring his engine under control, as was or is necessary before the defendant should be charged with being “grossly” negligent as the common usual acceptation of the term grossly implies.

Therefore, I concur in the opinion of the Chief Justice so far as the above applies.

CANAL ZONE *versus* BLISSETT & MCPHERSON.

No. 78. Argued April 24, 1911. Decided May 5, 1911.

MANSLAUGHTER.

Riding a horse at a reckless pace through a crowded thoroughfare as a result of which a child is trampled upon and killed constitutes criminal negligence and the one causing death in such a manner is guilty of manslaughter.

One who is engaged in a commission of an unlawful act not amounting to felony and by such act kills another is guilty of manslaughter.

Appeal from the Circuit Court of the Second Judicial Circuit;
Wesley M. Owen, Judge.

The facts appears in the opinion.

Carrington and Todd and E. M. Robinson for appellants.
Charles R. Williams for appellee.

THOMAS E. BROWN, JR., J. The defendants were tried in the Circuit Court of the Second Circuit on an information charging them jointly with the crime of manslaughter in unlawfully killing one Fernando Gaitan on the 11th day of January, 1911, Gaitan being a boy about 5 years of age. The court found both defendants guilty as charged in the information and from the judgment of the court below defendants appeal.

The information consists of six counts. Stripped of its legal verbiage the information alleges as the facts on which the charge of manslaughter is founded that on the 11th day of January, 1911, while riding their horses on the public road between Empire and Culebra, which road was then and there being traveled upon by various persons, the defendants raced their horses and rode them at a fast and reckless pace and that while they were riding their horses in such manner, either the horse ridden by defendant,

Blissett, or the horse ridden by the defendant, McPherson, ran over the boy, Gaitan, who was then upon the road, and that the boy thereby received injuries which caused his death. These allegations of fact are found substantially in each count of the information. The first count of the information charges in substance that the child was killed by the horse of Blissett, by reason of the fact that the defendants "did then and there in an unlawful manner and without due caution or circumspection, unlawfully, * * * ride said horses at a fast and reckless pace."

The second count likewise charges in substance that the child was killed by the horse of Blissett while the defendants were engaged in the commission of an unlawful act, to wit, "disorderly conduct, and a breach and disturbance of the peace."

The third count charges, in substance, that the child was killed by the horse of the other defendant, McPherson, while the defendants were riding said horses at a "fast and reckless pace, in an unlawful manner and without due caution and circumspection."

The fourth count charges, in substance, that the child was killed by the horse ridden by McPherson while the defendants were engaged "in the commission of an unlawful act not amounting to a felony, to wit, disorderly conduct, and a breach and disturbance of the peace."

The fifth count charges, in substance, that the particular horse, which struck the child, is unknown, but that the defendants were engaged "in the commission of an unlawful act not amounting to a felony, to wit, disorderly conduct, and a breach and disturbance of the peace."

The sixth count likewise charges in substance, that the particular horse, which struck the child, is unknown, but that the defendants "did then and there, in an unlawful manner, and without due caution and circumspection * * * ride said horses at a fast and reckless pace."

The trial judge filed an opinion in the cause in which he stated, among other things, that the evidence introduced established that on January 11, 1911, the defendants were riding their horses at a high rate of speed on the street or public highway in Empire, Canal Zone; that at about 6.30 p. m., they galloped through such street and ran over two children; that one of the children, Fernando Gaitan, was mortally wounded and died as a result of such wound; that the neighborhood of the occurrence was thickly settled, that at that point all pedestrians commonly walked in the roadway, as there was no sidewalk or footpath independent of the

roadway; that adults traveling such highway at the time of the occurrence, were forced to seek the side of the road in order to preserve their own safety from the horses, and that an ocular inspection of the scene of the occurrence (taken at request of counsel for one of the defendants), disclosed that had defendants been riding at a reasonable rate of speed they could have checked their horses because the two children who were knocked down were within view.

Reversal of the judgment in the cause is urged mainly on the ground that even if defendants were racing their horses and running them at the fast and reckless pace as alleged in the information and found by the trial judge, the defendants while so riding were not engaged in the commission of any unlawful act for the reason there is no express provision of law prohibiting horse racing on the public roads in the Canal Zone.

The court below stated in its opinion that there is no statute or order having the effect of law which prohibits horse racing, but that under the circumstances shown by the evidence the "defendants were guilty of disorderly conduct in fast riding of their horses" and, therefore, guilty of an "unlawful act not amounting to a felony" which act resulted in death. The defendants claim, however, that the Executive Order making "any disorderly conduct" a "misdemeanor" does not define disorderly conduct and the mere term "disorderly conduct" is too vague and uncertain to sustain the finding that "disorderly conduct" is an "unlawful act."

In support of their contentions, defendants call the court's attention to the leading case of *Johnson vs. State*, 66 Ohio St. 59, and 61 L. R. A., 277.

Ohio is a State in which the doctrine is adopted that under the law of the State there are no common law crimes. In the case referred to, the Ohio Court held that:

In a prosecution for manslaughter, wherein the State relies for conviction on the ground that deceased was killed unintentionally while the slayer was in the commission of an unlawful act it must be shown that the alleged unlawful act is prohibited by law—and it is not sufficient to establish that such act, so engaged in, was a crime at common law or one of gross and culpable negligence.

A careful reading of *Johnson vs. State*, discloses that the act alleged by the prosecution as the unlawful act which the defendant was engaged in at the time of the killing, was the act of riding a bicycle in a grossly and culpably negligent manner on a much-

traveled highway. The unintentional killing of a human being due to the gross and culpable negligence of the slayer in the performance or omission of a duty was a crime at common law, but there was no statute in the State of Ohio making it such. The text of the case also shows that the Ohio statute with relation to manslaughter is different from the section of the Penal Code of the Canal Zone defining the same offense. Section 6811 of the revised statutes of the State of Ohio, which was in force at the time of the decision in *Johnson vs. State*, reads:

Whoever unlawfully kills another, except as provided in the last three sections, is guilty of manslaughter. (The preceding three sections defined murder in the first and second degrees.)

The court construed the words "unlawful act" when the killing was unintentional, as already quoted.

Section 150 of the Penal Code of the Canal Zone reads:

Manslaughter is the unlawful killing of a human being without malice. It is of two kinds:

- (1) Voluntary—upon a sudden quarrel or heat of passion.
- (2) Involuntary—in the commission of an unlawful act not amounting to a felony; or in the commission of a lawful act which might produce death in an unlawful manner, or without due caution and circumspection.

It will be noted that section 150 of the Penal Code of the Canal Zone is more specific than the Ohio statute. The words "without due caution and circumspection" in the second subdivision may be said in effect to operate as an enactment into our law of the common law crime arising from gross and culpable negligence. If, therefore, the information and the facts in evidence bring the case before us within the last portion of the second subdivision of section 150 of the Canal Zone Penal Code, the objection, raised from the decision in *Johnson vs. State*, is defeated.

Counsel for defendants argued that there is no common law in the Canal Zone and that, therefore, the court below could not lawfully find a verdict of guilty on its opinion that the facts in evidence showed that the defendants were engaged in the unlawful act of disorderly conduct at the time the killing occurred. It is true that there are no common-law crimes, as such, in the Canal Zone; crimes here are statutory, but they are declared in terms which are often common-law terms. There are crimes, the legal statement and designation of which are born of the legal traditions and history of the various jurisdictions of the United States of America. It is a truism, therefore, that the courts of the Canal Zone may interpret and, in proper case, must define terms used in the

criminal laws of the Zone by reference to the general trend of the practice in and decisions of the Federal courts and the courts of the various States of the United States. The crimes triable by the statutory Federal courts are in general statutory and not, as such, common-law crimes; but from an early date Federal courts have consistently held that while the common law can not be recognized as the source of their criminal jurisdiction this does not exclude the operation of the common law as a standard of interpretation. And an examination of decisions of the Federal courts will show that while the Federal courts have no jurisdiction of offenses not declared to be such by Federal statutes, yet, as these statutes mostly designate offenses by title, the Federal courts resort to the common law for definition of such offenses and the common law, therefore, becomes the arbiter of what such offenses are. It is equally true in the Canal Zone, that where an offense is designated in the law merely by title, if the offense thus designated is susceptible of interpretation and definition by resort to the decision of the courts of jurisdictions in which such title is a common-law or statutory designation of an offense, then such interpretation and definition is within the authority of the courts of the Zone.

Executive Order of January 9, 1908, subdivision 8, provides that:

Every person who shall in the Canal Zone engage in any kind of disorderly conduct * * * shall be guilty of a misdemeanor.

The statutes of several of the States contain provisions similar to the above with reference to disorderly conduct and such provisions are without definition or specification of what constitutes disorderly conduct. The courts of States where such provisions are in force have interpreted the term by judicial decision. The term "disorderly conduct" has, therefore, become a title descriptive of an offense well known to the law, and since "any kind of disorderly conduct" is made a misdemeanor in the Canal Zone, an act which is disorderly conduct is an "unlawful act not amounting to a felony."

The court below found a general verdict of guilty as charged in the information. If, therefore, the information and the facts sustain the verdict it is unimportant on what theory the trial court arrived at its verdict. The information not only charges the defendants with causing the death of the boy, Gaitan, while they were engaged in the "commission of an unlawful act not amounting to a felony," but the first, third, and sixth counts.

distinctly bring the offense within the provisions of the last portion of the second subdivision of section 150 of the Penal Code. The portion of the section referred to reads as before quoted:

Or in the commission of a lawful act which might produce death in an unlawful manner or without due caution and circumspection.

It is true that the pleader does not use in the counts of the information mentioned, the exact words quoted, but the essence of the offense charged in the first, third, and sixth counts, is that, on a much-traveled highway at a fast and reckless pace, without due caution and circumspection and, therefore, in an unlawful manner, the defendants raced or rode their horses, and that the act of riding their horses in such a manner produced death. The pleading brings the charge substantially within the provisions of the last-quoted portion of section 150 of the Penal Code and is such a statement of the act constituting the offense "as to enable a person of common understanding to know what is intended." (Section 66, subdivision 2, Code of Criminal Procedure.)

An examination of the record shows that there is sufficient evidence to sustain the first, third, and sixth counts of the indictment and sufficient evidence to sustain the verdict of guilty as charged in the information. The defendants jointly contributed to the killing. They are, therefore, jointly responsible.

The judgment of the trial court is therefore affirmed.

Affirmed.

CANAL ZONE *versus* PETERSON & SILVERS.

No. 79. Argued November 6, 1911. Decided November 20, 1911.

EMBEZZLEMENT.

One who purchases and receives property which he knows to have been embezzled by the vendor and converts said property to his own use is guilty of embezzlement.

INFORMATION AND SUFFICIENCY.

An information charging the defendant with the commission of the crime of embezzlement is sufficient if it enumerates the articles alleged to have been embezzled. An itemized statement as to the value thereof is not required.

TESTIMONY—RES GESTÆ.

A statement by an accomplice, even though not in the presence of his co-defendants, if made during the pendency of the criminal enterprise and in furtherance of its objects, is part of the *res gestæ*.

IMPEACHMENT.

Whether or not a witness has been successfully impeached is a question of fact and not of law.

Appeal from the Circuit Court, First Judicial Circuit, Hon. Wesley M. Owen, Judge.

The facts appear in the opinion.

Hinckley and *Ganson* for appellants. *Charles R. Williams* for appellee.

WM. H. JACKSON, J. The appellants, F. P. Peterson and Charles Silvers, defendants below, were tried in the Circuit Court of the First Judicial Circuit upon six informations, No. 436 to No. 441, inclusive, filed in said court on the 12th day of December, 1910, which charged that the said defendants did, at the times set forth in said informations, unlawfully and feloniously aid and abet one H. J. Hines to commit the crime of embezzlement, and to fraudulently appropriate goods and property of the Isthmian Canal Commission to the use of the said H. J. Hines. Information No. 436 alleges that on or about the 7th day of December, 1910, at or near Balboa, Canal Zone, said defendants, together with others, did feloniously commit the crime of embezzlement by unlawfully and feloniously aiding and abetting the said Hines to appropriate to his own use certain goods and property of the Isthmian Canal Commission of the value of \$73.17. In this information an itemized statement of the articles and the values thereof, alleged to have been appropriated, is specifically set forth. In the other informations, No. 437 to No. 441, inclusive, it is alleged generally that the goods and property of the Isthmian Canal Commission embezzled were of the values of \$50 and \$60, consisting of pork chops, chickens dressed, veal cutlets, pork sausage, lieberwurst sausage, and butter, all of the foregoing being known as cold-storage articles; and the following contained in tin cans and cases, to wit: Peaches, pears, string beans, peas, spinach, milk, and lima beans, the exact amount in value of each article not being known. On December 19, 1910, defendants moved the court that a bill of particulars be ordered to accompany the informations in cases No. 437 to No. 441, inclusive, to the end that they might be more fully advised of the particular articles of

personal property, if any, by them embezzled, and, furthermore, that the value of each article alleged to have been embezzled be therein set forth. On the same day a demurrer was filed to all of the informations, No. 436 to No. 441, inclusive, upon the ground chiefly that the said informations are not sufficient in law to constitute a cause of action against the defendants or either of them. This demurrer raised the question not only of the sufficiency of the allegations in the information which was also covered by the motion for a bill of particulars, but also the question of the jurisdiction of the court, which will be considered later. On December 31, 1910, the motion for a bill of particulars and the demurrer were overruled, to which ruling the defendants duly excepted. On January 4, 1911, it was agreed by counsel that the trial on all six informations should be held at the same time, but the decision of the court should be given separately after a separate consideration of each cause. On January 6, 1911, the trial court found the defendants guilty on each of said informations, and, after overruling motions for a new trial and in arrest of judgment, on January 9, 1911, the defendants, Peterson and Silvers, were sentenced by the court to be confined in the penitentiary of the Canal Zone at hard labor for and during a period of two years under the verdict in case No. 436, and for two months under the verdict in case No. 437, and for one month each under the verdicts in causes No. 438 to No. 441, inclusive, making 2 years and 6 months in all. The defendants prayed an appeal, which was granted on said 9th day of January, 1911, and they are now before this court on said appeal with their bill of exceptions, which latter was approved and docketed herein on the 6th day of March, 1911. The errors alleged to have been committed by the court below and which are before us for review upon this appeal are as set forth in the appellants' brief as follows:

1st. The court erred in overruling the defendants' motion for a bill of particulars, and in overruling the demurrer to the informations.

2d. The court erred in admitting incompetent, irrelevant, and immaterial evidence introduced by the plaintiff and duly objected to by the defendants.

3d. That the court erred in the admission of evidence as to the value of the articles alleged to have been embezzled—the point here raised being that the value of the articles alleged to have been embezzled was not proved according to the legal requirements.

4th. That the court erred in holding that certain witnesses for the Government, Louis Aris and Wilbert Von Certon, had not been successfully impeached by the defense.

5th. That the court erred in overruling defendants' motion to dismiss at end of plaintiff's case, which raises the question that the evidence offered by the Government did not establish a prima facie case of embezzlement; and

6th. That the court erred in rendering judgment against the defendants at the conclusion of the case; which raises the same question upon the whole testimony as that raised in the fifth assignment for the case as presented by the Government alone.

We will consider the assignments of error in the order in which they are here stated.

The motion for a bill of particulars applied to informations No. 437 to No. 441, inclusive, wherein the articles alleged to have been embezzled, together with the accompanying values of each were not specifically set forth. The motion for a bill of particulars raised the question of the necessity for such particularization. Quoting from section 85 of the Code of Criminal Procedure of the Canal Zone as to informations for the larceny or embezzlement of money, bank notes, etc., counsel for appellants argue that for all goods of any other nature whatsoever, alleged to have been embezzled, it is necessary that the same be accurately listed and valued. We think the informations in this respect were sufficient. Section 368 of the Penal Code of the Canal Zone provides as follows:

Every person guilty of embezzlement is punishable, in the manner prescribed for feloniously stealing property of the value of that embezzled; and where the property embezzled is an evidence of debt, or right of action, the sum due upon it or evidenced to be paid by it, shall be taken as its value; *Provided*, That if the embezzlement or defalcation be of the property or public funds of the United States, the Isthmian Canal Commission, or of the Government of the Canal Zone, the offense is a felony * * *

This provision, we think, shows that the embezzlement of any property of the Isthmian Canal Commission, regardless of the value thereof, is a felony. When such is the case the value of the property is immaterial and need not be alleged nor proven, provided it manifestly appears that the articles alleged to have been so embezzled are of some value. (Clarke and Marshall's Criminal Law, secs. 441 and 505. Bishop's New Criminal Law, vol. 1, p. 541. Am. and Eng. Ency. of Law, vol. 10, p. 985.)

Now, it would be absurd to say that such articles as those set forth in these informations, namely, pork chops, chickens, cutlets, pork sausage, etc., were valueless, and being of some value, as we must know, it follows that the general allegations in the information were sufficient.

Neither is the contention sound that each particular article and the value thereof should be specifically stated in order to sufficiently advise the defendants with what they are charged, and also in order to protect them from a subsequent trial for the same offense. The informations allege, in this respect, "the exact amount in value of each article not being known." This knowledge was peculiarly in the possession of the defense and not in the possession of the Government, and under the circumstances the granting or refusal of a motion for a bill of particulars was a matter of discretion with the court. Such an exercise of discretion on the part of the trial court can not be reviewed on error or appeal except it be an abuse of discretion, which does not appear in this case.

In the case of Mayo versus the State, 30 Alabama, page 32, it was decided that the following description of goods alleged to have been embezzled was sufficient:

Certain books, letter files, knives, bank shares, slates, and sealing wax to about the value of \$40.

Nor could defendants claim that they could be subjected to another prosecution by reason of failure of particularization in this respect. The allegations were sufficient to constitute a bar to any further prosecution. As stated in the American and English Encyclopedia of Law, volumn 18, page 531:

It follows from the rules previously stated that a prosecution for any part of a single crime will bar any future prosecution based on the same or a part of the same crime. So, in the United States, it is held that where several articles of property belonging to the same person were taken at the same time and with the same intent, a prosecution for larceny for any one of such articles will bar a subsequent indictment for larceny of others or any of them.

This shows that the defendants could not be tried again for any larceny arising out of the alleged transactions referred to in these informations.

We think also the demurrers were properly overruled. As heretofore stated, the several informations did state facts sufficient in law to constitute a cause of action, but the question of jurisdiction, which was raised before the trial court, requires a brief consideration of the facts of the case in order to determine if the necessary jurisdiction existed. The first count of the information alleged generally that the defendants did then and there, knowing the said H. J. Hines to be the agent of the Isthmian Canal Commission, and knowing the said goods to be the goods and property

of the Isthmian Canal Commission, unlawfully and feloniously aid and abet the said H. J. Hines to commit the crime of embezzlement, etc. The demurrer was, therefore, overruled upon the ground, as stated in the opinion, that the first count charged practically that the defendants were present and participated in the offense charged. The second count alleges that said defendants, Peterson and Silvers, at the time aforesaid, though not actually within the jurisdiction of the court, did wilfully, unlawfully, and feloniously commit the crime of embezzlement by aiding and abetting Hines. The facts in the case show that neither Peterson or Silvers did any act or thing personally within the jurisdiction of the Canal Zone in relation to the embezzlement alleged. They show that Peterson and Silvers were the proprietors of the Hotel Metropole in the city of Panama, and that Hines, for some time prior to the acts alleged, lived at their hotel; that Hines was charged with the duty of receiving and delivering commissaries to the floating equipment of the Pacific Division at Balboa; and that some time prior to the date of the first transaction alleged in the informations, namely, October 31, 1910, Hines had embezzled and appropriated to his use quantities of cold-storage and commissary goods, which were delivered to the defendants in Panama, and which were hauled from the dredge landing at Balboa to the defendants' hotel in the defendants' wagon. The date of the first delivery of such goods to the defendants does not clearly appear. Some of the witnesses for the Government fix the date as of February, 1910, while the defendant, Silvers, fixes the date as of about July or August, 1910, but the evidence shows that for sometime prior to October 31, 1910, these embezzlements by Hines and the delivery of the embezzled goods to the defendants in the manner herein stated had continued. But the defendants claim that they did not know of such embezzlement, and also claim that they did not send their wagon to Balboa for the purpose of there receiving the goods so embezzled. Two questions of fact were thus presented for the finding of the trial court. (1st) Did the defendants know that the goods delivered to them from time to time by Hines were being embezzled? (2d) If so, did they merely receive the stolen goods thereafter in Panama; or did they aid and abet in the embezzlements as charged in the information, by sending their wagon, in charge of their driver, to Balboa, as a means or instrumentality to assist in the success of the embezzlement or unlawful enterprise? It is unnecessary at this point

to go fully into the evidence upon this question. The witness, Aris, a driver of defendants' wagon, called by the Government, stated, in substance, that he was instructed by the defendants to go to Balboa with the wagon to see Hines, and while it appeared that Aris frequently went to Balboa as a runner (for the hotel) to bring passengers and baggage from the steamships, it also, appears from his testimony that he went generally to the dredge landing on Mondays after Hines had made his distribution of the goods to the floating equipment, and that on said dates he did not bring back any baggage or passengers, but only the provisions. (See p. 52 of record.) It also appears that two other drivers for defendants, namely, Rodriguez and Hinkson, had, subsequent to Aris, gone with the wagon to the dredge landing at Balboa and received goods from Hines, which they delivered to the Hotel Metropole. Without going into a general review of the testimony it is sufficient to say that there were facts sufficient to authorize the court below in finding that the defendants were knowingly permitting the use of their wagon, and the drivers thereof to be used, as a means for aiding and abetting Hines in the commission of the embezzlements. For this reason we think they must be held to have been constructively present in the Canal Zone for the commission of the acts. It was not necessary that they should be actually present if their acts or conduct in sending agents or agencies into the Zone for the purpose did in fact in any wise aid or assist in the commission of the alleged acts of embezzlement. In Clark's Criminal Law, second edition, page 102, it is stated:

A person in one State, committing an act in another State through an innocent agent, is liable, as having himself committed the act in the latter State.

Citing *People vs. Adams*, third Denio, New York, 190, Clark's Criminal Procedure, page 14. This we think correctly states the principle of law applicable to this case. We think there was evidence sufficient to justify the court in finding that the defendants aided and abetted Hines through the innocent agency of their drivers and wagon to commit the embezzlements in the Canal Zone, and that although not actually present, the defendants were, by reason of these facts, so found by the court, constructively present for the purpose of the commission of the acts alleged; therefore, it was not error for the court to overrule the demurrer, based upon the insufficiency of the allegations, nor was it error to hold upon the facts as developed upon the trial that the court had jurisdiction.

The second assignment of error relates to the admission in evidence of the testimony of A. G. Belknap, the Inspector of the Police Department, as to the circumstances attending the arrest of Rodriguez, the driver of the Metropole wagon, on December 7, 1910, as follows:

Q. Where was Rodriguez when you made the arrest?

A. Driving the Metropole wagon along the Balboa road.

Q. What did you say to him?

A. I asked him where he was going. He said he was going to Panama. I asked him what he had in the wagon, and he said he had a load of grass. I asked him if he had anything else, and he said he did not.

Q. What took place then?

A. I went to the back part of the wagon and inspected its contents. I found four bags there, two cases of eggs, a keg of pigs' feet.

Q. Where was this stuff?

A. It was under a load of grass on the wagon.

Q. Could you see it from the outside?

A. No, sir, it was impossible to see it unless you raised the grass.

The defendants claim that this was hearsay evidence and was improperly admitted, but, even so, this can not be complained of for the reason that it was stricken from the record on motion of defendants' counsel. On page 72 the court said in relation to this very testimony, and also to the testimony of conversations with Hines at the time not made in the presence or hearing of the defendants:

It may be all stricken except the description of the property and the statement that it was covered with grass; that may stand.

But the error, if any, in this respect is further cured by the subsequent testimony of defendants' witness, Rodriguez, which was to the same effect as the testimony objected to, and by the subsequent testimony of Belknap, who, on page 118, restated the same without any objection on the part of counsel for the defendants. Testimony as there appears in the record, without any objections, on page 118, is as follows:

Q. What did you ask Rodriguez, Mr. Belknap, on that occasion?

A. On December 7th I asked him where he was going.

Q. What did he say?

A. He said "to Panama."

Q. Asked him what he had in the wagon?

A. He said "grass." I asked him if he had anything else, He said he did not.

It was further claimed that the court erred in admitting the testimony of the witness, Aris, over the objection and exception of counsel as follows: (Record p. 35.)

Q. What did you do with it when you went to the dredge landing?

A. I covered the bags with the grass. Mr. Hines told me to cover that with the grass.

This it is claimed was hearsay evidence, a statement made by one defendant not in the hearing or presence of the other, and, therefore, as such, that it was improperly admitted. Defendants rely in support of this contention upon several cases cited in the brief, notably that of *People vs. Moore*, 45 Cal., page 19, where it was stated:

It was never competent to use as evidence against one on trial for an alleged crime the statements of an accomplice not given as testimony in the case nor made in the presence of the defendant nor during the pendency of the criminal enterprise and in furtherance of its objects. To hold such testimony admissible would be to ignore the rules of evidence settled and everywhere recognized from the earliest times.

To the same effect are the cases of *People vs. Winters*, 125 Cal., 325; *People vs. Oldham*, 111 Cal., 648; and *People vs. Opie*, 123 Cal., 294, cited in brief of counsel for defendants, and which we have examined, but the application of the rule there stated to the case at bar is not pertinent for the reason that this statement of Hines (to cover the bags with grass), if made, was evidently made during the pendency of the criminal enterprise and manifestly in furtherance of its objects. It was in fact a part of the *res gestæ* as the statements were made while the defendant, Hines, was actually engaged in the criminal acts. While the rule of law undoubtedly is that the existence of a conspiracy can not be proved by the statements or declarations of one of the conspirators, and that the conspiracy or unlawful enterprise must be established by other evidence before the act or statement of one conspirator can be regarded as evidence against another, it is nevertheless true that such conspiracy may be proved by inference and found from all the facts and circumstances of the case without any direct evidence, and also that if a declaration of an alleged conspirator is received before the conspiracy has been proved, and if the conspiracy should thereafter be established, that the declaration or act will not be held to have been improperly received. In the *American and English Encyclopedia of Law*, volume 6, page 866 et seq., the rule is stated as follows:

When the fact of a conspiracy has been proved or established by reasonable inference, the acts and declarations of one conspirator in furtherance of, or made with reference to, the common design, are admissible in evidence against his associates.

And regarding the order of proof the courts have held as follows:

The rules that the conspiracy must first be established *prima facie* before the acts of one confederate can be received in evidence against another can not well be enforced where the proof depends upon a vast number of isolated circumstances. In any event where the whole evidence shows that a conspiracy actually existed it will be considered immaterial whether the conspiracy was established before or after the acts and declarations of the members. (*Spies vs. People*, 122 Ill.); *State vs. Winner*, 17 Kans., 298; and *Loggins vs. State*, 12, Tex., App. 65.)

Conceding then that the evidence of Aris as to Hines's acts and statements was admitted before the conspiracy was established, this becomes immaterial in view of all the other evidence in the case, including the evidence of the defendants, Silvers and Peterson, themselves, from which we think the court was reasonably justified in finding that such a conspiracy existed.

The other evidence claimed to have been erroneously admitted was that of A. G. Belknap relating to the value of the articles alleged to have been embezzled on December 7, 1910. Officer Belknap made a list or inventory thereof, which was set forth in information No. 436, and he testified as to the list, and also as to the prices or values of the goods specified therein as follows:

Q. You are refreshing your memory from reading that list. Is that the stuff you took out of the wagon?

A. Yes, this is a true copy of the inventory made by myself on that day.

Q. Did you inform yourself as to the prices?

A. I did on that day.

Q. Are the prices stated there the correct value of these articles?

A. I did by a correct list furnished by the commissary on that particular day.

The Court. It is necessary to show that the prices on that list were the prices at that hour.

Q. Is that a fact?

A. It is.

All of the evidence was admitted over the objection and subject to the exception of the defendants, and it is claimed that it was erroneously admitted for two reasons: (1st) Because it amounted in substance to introducing the information itself as evidence in the case; and (2d) because Belknap had not sufficiently qualified as an expert on values. An inspection of the record shows that the information was not offered or received in evidence but that Belknap merely testified from his own knowledge by refreshing his memory from the list.

As to the second objection to this evidence, we do not think that it is necessary that the witness, on the question of value,

should have been an expert in the strict technical sense of the word. His statement that he had informed himself as to the prevailing prices or values of the hour were all sufficient to make him competent as a witness in this regard, subject, of course, to the right of cross-examination to test his competency and credibility. But, moreover, as already stated, the property alleged to have been embezzled, being that of the Isthmian Canal Commission, the question of the value was immaterial, the only requirement being that the property must not be valueless. In all cases where it is necessary to prove only some value it has been held that "direct evidence proving the precise value is not required. The jury may infer that the stolen property has value from the evidence of its character and use." (Underhill Criminal Evidence, p. 358, sec. 298; Am. & Eng. Ency. of Law, p. 464.)

The next assignment of error relates to the impeachment of the witnesses, Louis Aris and Wilbert Von Certon. It is claimed that the evidence of the witness, Wilbert Von Certon, who testified in substance, that he was the steward for the hotel, and that he bought the supplies, and that he had for some time bought them for the hotel, in the market, except on Mondays, on which days the commissary supplies were uniformly delivered to the hotel, and that the defendant, Peterson, told him that he need not buy meat in the market on Mondays, should not have been regarded by the court because of the alleged impeachment of the said Von Certon. The impeachment of Von Certon was claimed as the result of certain negotiations or transactions between him and the defendant, Silvers, from which it might be inferred that Von Certon desired to secure a loan of \$120 from Silvers, in consideration of which he would leave the country and not appear as a witness, but there is much uncertainty and contradiction of evidence as to who sought the interviews and introduced the negotiations leading up to this matter, and, looking at the evidence in this respect as a whole, we can not say that the court below would not have been justified in finding that the original overture came from Silvers instead of Von Certon.

As to the impeachment of Aris, the driver of the wagon, who testified that, "sometimes Mr. Peterson or Mr. Silvers told me to go to the dredge landing to Mr. Hines," and who also testified to his covering the goods in question with grass by the direction of Hines when he did go to the dredge landing to receive the goods from the latter, it was claimed that this was successfully done, by the testimony of numerous witnesses who stated in substance

that the reputation of said Aris for truth and veracity was bad. It is claimed that as a matter of law this required the court to throw out and entirely disregard the evidence of Aris. But the court was not bound by the evidence of the impeaching witnesses, but might, in its judgment, have considered their testimony insufficient to establish an impeachment. Moreover, the question of impeachment is not one of law but of fact. All of the authorities hold, that the credibility of a witness is a question of fact, and whether a witness has been successfully impeached is a question of fact and not of law. (Am. and Eng. Ency. of Law, vol. 30, pp. 1064-5.)

The fifth and sixth assignments of error, namely, that the court erred in overruling defendants' motion to dismiss at the end of the plaintiff's case, and in rendering judgment against the defendants at the conclusion of the whole case, will be considered together. These assignments present the grounds specified in the motion for a new trial, namely, that the verdict is contrary to law, and is contrary to the evidence, and against the weight of the evidence. In approaching these assignments it is well to bear in mind the matters which may properly be reviewed by the Supreme Court on appeal from the Circuit Court. Section 210 of the Code of Criminal Procedure of the Canal Zone provides:

On the trial of an information exceptions may be taken by the defendant to a decision of the court in admitting or rejecting testimony, or in deciding any question of law not a matter of discretion on the trial of the issue.

Section 260 provides:

Either party in a criminal action amounting to a felony may appeal to the Supreme Court on questions of law alone, as prescribed in this chapter.

This court has already held that these provisions mean that the Supreme Court would not be justified in reversing a finding of the court below except upon a question of law, provided, of course, that any evidence was offered to justify the court, as a matter of law, in its finding. In other words, the finding of the court must be reviewed exactly as if the trial were by a jury where, if any evidence were offered to justify the jury in reaching a verdict, the court could not set aside the verdict as being contrary to law. Looked at in this light, was the evidence sufficient to justify the court in its verdict and judgment in this case? We have already reviewed the evidence in a general way, and need only add that the admitted acts of embezzlement on the part of Hines, extending over a long period of time, estimated from about six to nine months and the continued receipt of the embezzled goods by the defend-

ants in the manner and under the circumstances, indicate to our minds that the court below was justified in reaching its verdict of guilty. The evidence of Aris, the first driver, that he went to the dredge landing at the direction of Peterson or Silvers every Monday for a long period of time, and that in receiving the stolen goods he always covered them with grass at the direction of Hines, and the evidence of the other drivers, Hinkson and Rodriguez, together with the damaging evidence of Officer Belknap, as to the circumstances attending the arrest of Rodriguez on the 7th of December, 1910, and the evidence of Von Certon that he bought goods for the hotel in the market every day except Monday, when the Metropole wagon came with the embezzled goods from Hines, and that he was told by Peterson that he need not purchase any meat in the market on Mondays, and the fact that Hines lived at the defendants' hotel, and must have been known by them to be the agent of the Commission, having these goods in his custody as such agent, and the evidence disclosed by Silvers' own testimony, which shows that no proper books were kept showing his dealings with Hines, and all the facts and circumstances in the case tend to abundantly justify the court below in its finding. To this must be added the fact that under and by virtue of the treaty between the United States and the Republic of Panama, in section 13 thereof, it was provided in substance that the United States may import all provisions, medicines, clothing, supplies, and other things necessary and convenient for the officers, employees, workmen, and laborers, free from any customs' duties, imposts of taxes, provided that such articles so imported free should not be disposed of for use outside of the Zone anywhere within the territory of the Republic without the payment of duty thereon. Now, the defendants lived in the Republic of Panama, and the provisions of this treaty may be considered as in the nature of a public law, and while these defendants in a criminal action, where guilty knowledge and intent is the essence of the crime, might not be chargeable, as a matter of law, with a knowledge of its provisions in that respect, nevertheless it was fair and reasonable, when looked at in the light of all the other facts and circumstances, to infer that they did have such knowledge, and did know that Hines was not authorized to deliver them goods in such quantities each week. Moreover, it is important to remember that Hines was not the agent to sell these commissary supplies to anyone. He was merely the agent for the purpose of receiving and distributing them to the floating equipment of

the Pacific Division. He did not have the actual or ostensible authority to dispose of them in any other manner. If defendants had wished in good faith to purchase goods from the Commissary Department, the customary and proper course of dealing would suggest that they should negotiate with the proper officials, or at least apply to the agents who ordinarily sold the goods to Commission employees. This has a bearing in considering their guilty knowledge and intent. And in this connection it is proper also to consider the testimony of Officer Belknap wherein he states on cross-examination that no one but an employee of the Commission or the Panama Railroad Company is entitled to commissary privileges, and that the custom of so limiting these privileges was well known. This testimony was uncontradicted and no effort made on the part of the defendants to contradict it, and it must, therefore, have had great weight with the trial judge, as it does with this court, in reaching its conclusion.

The judgment of the court below in its verdict of guilty and in the imposition of its sentence in information No. 436 is, therefore, affirmed.

Coming next to informations, namely, No. 437 to No. 441, inclusive, in which there was, strictly speaking, a failure of proof on the part of the Government to show positively the quantity and value of the goods delivered on the dates specified, nevertheless the evidence of the drivers themselves, who drove and had charge of the Metropole wagon which carried the embezzled goods, and the evidence of those who were in the employ of Hines and who helped him load the goods into the wagon, namely, Thomas Blackburn, St. Clair Gibson, and Cecil Holder, all show that on the dates mentioned in these different indictments various articles of cold-storage and other provisions were loaded into the wagons, and that they were conveyed by these wagons and delivered to the defendants at the Hotel Metropole. As heretofore stated in this opinion, where property of the Government of the United States or of the Canal Commission is embezzled or stolen, it is not necessary to prove the value or the identical pieces of property stolen, provided it appears that property or articles of the description named in the indictment were so embezzled or stolen and that they were not valueless.

For the reasons herein stated the verdicts of the court and the judgments and sentences in the informations No. 437 to 441, inclusive, are likewise affirmed.

It is, therefore, ordered, and adjudged that the judgments and verdicts of the court below be affirmed, and that this case be remanded with instructions that the court proceed according to law.

Affirmed.

CANAL ZONE *versus* PEREZ.

No. 80. Decided November 6, 1911.

Appeal from the Circuit Court of the Second Judicial Circuit, Hon. Wesley M. Owen, Judge.

S. B. Dannis for appellant. *Charles R. Williams* for appellee.

THOS. E. BROWN, JR., J. At the February term, 1911, of the Circuit Court for the Second Judicial Circuit, the appellant, Alejo Perez, was tried for murder by a jury, found guilty of murder in the second degree, and sentenced to 15 years at hard labor in the penitentiary. From this judgment he appeals to this court.

The grounds for the defendant's appeal, alleged by his counsel, may be stated generally to be based upon the claim that the penal laws of the Canal Zone and the laws of criminal procedure pursuant to which the defendant was charged and convicted are null and void for the reason that same were enacted without due authority of the Congress of the United States. Defendant's objections as above stated appear to this court not to have been raised seriously, and to be frivolous. The judgment and sentence of the court below are, therefore, affirmed.

BRUUN *versus* THORNTON.

No. 81. Argued May 15, 1911. Decided August 31, 1911.

GUARANTY.

A contract of guaranty should be construed in accordance with the terms thereof, and, if there be any doubt as to the proper construction, the court should take into consideration the surrounding circumstances in order to determine what the parties had in mind at the time that the contract was executed.

Appeal from the Circuit Court, Second Judicial Circuit,
Hon. Wesley M. Owen, Judge.

The facts appear in the opinion.

Carrington and *Todd* for appellant. *MacIntyre* and *Rogers* for appellee.

THOS. E. BROWN, JR., J. This is an appeal from a judgment of the Circuit Court of the Second Judicial Circuit.

The respondent, defendant below, filed a motion to dismiss the appeal. The motion to dismiss is based on three alleged grounds:

(1) Because the appellant failed to comply with the court rule now in force requiring appellant to pay the estimated fee for making the record within five days of notice of the amount chargeable.

(2) Because the appellant's bill of exceptions does not conform to the provisions of section 132 of the Code of Civil Procedure in that it contains all the evidence taken at the trial instead of being a "brief statement of facts."

(3) Because the appellant requested the court below to deny his motion for a new trial.

Respondent's motion to dismiss is denied for the following reasons:

(1) The court rules now in force were not published until after appellant perfected his appeal.

(2) While the reproduction in the bill of exceptions of all the evidence introduced at the trial is probably not that "brief statement of facts" contemplated by the terms of section 132 of the Code of Civil Procedure, yet custom has so far sanctioned the

practice of reproducing all the evidence that the practice must be held to be a substantial compliance with the provisions of the section.

(3) The record does not sustain the contention that at the time of the formal submission of this motion for a new trial appellant requested the court below to overrule it.

The law of the Canal Zone does not favor the dismissal of appeals to the Supreme Court on purely technical grounds when there is an important question of law to be determined. (Sec. 537, Code of Civil Procedure.)

The appellant, plaintiff below, was a wholesale liquor dealer in the city of Colon. On the 10th day of October, 1908, the respondent, defendant below, together with one Cuvillier executed and delivered to the appellant a certain written instrument in words as follows:

TABERNILLA, CANAL ZONE,
October 10, 1908.

Whereas, J. P. Eagan, of Tabernilla, is desirous of securing credit for goods, wares, and merchandise from H. M. Bruun, of Colon, Republic of Panama; and

Whereas, said H. M. Bruun is willing to extend credit to said Eagan, as above, in the sum of one thousand dollars, Panama silver;

Now, therefore, in consideration of the premises and the sum of one dollar to us in hand paid, receipt whereof is hereby acknowledged, we and each of us, jointly and severally hereby bind ourselves, our and each of our executors or administrators, unto said H. M. Bruun in the sum of one thousand dollars, Panama silver, for goods, wares, and merchandise sold or to be sold by said Bruun to said Eagan in case the said Eagan fails and neglects to pay for the same at the time when the bills therefor shall become due and payable. And it is hereby understood and agreed that at no time shall our, or either of our, liability exceed the amount herein stated.

In witness whereof, we, G. M. Cuvillier and E. B. Thornton have hereunto set our hands this 19th day of October, 1908.

(Sgd.) G. M. CUVILLIER,

(Sgd.) E. B. THORNTON.

About the time the instrument was delivered, J. P. Eagan, named in such instrument, started a liquor business at Tabernilla, Canal Zone. Bruun, the appellant, thereupon opened a running account with Eagan and from time to time sold and delivered to him merchandise exceeding in value the sum of \$3,000, Panamanian currency, said sales, as appellant alleges, being made on the faith of said instrument. Eagan made various payments on this account, such payments amounting to more than \$2,000, Panamanian currency. Eagan became insolvent in the latter part of the year 1908, or the early part of the year 1909, owing a balance on

said account of \$896.30, Panamanian currency. Thereupon, Thornton, the defendant and respondent, paid to Bruun, the appellant, in two different payments, the total sum of \$120, Panamanian currency, on account of said balance. The remainder of said sum alleged to be owing, viz, the sum of \$776.30, Panamanian currency, the appellant seeks to recover from the respondent alleging that the respondent is chargeable with the same under the terms of the written instrument hereinbefore set forth.

The court below found the issues in favor of the defendant, now the respondent, and filed an opinion in the cause which is as follows:

This is a suit instituted by H. M. Bruun against E. B. Thornton. The court finds the issues in favor of the defendant, and herewith submits the following findings of facts:

That the original contract or security upon which suit is brought and under which attempt is made to hold the defendant liable, is not a continuing obligation or security;

That the defendant and his cosurety stipulated and agreed to indemnify H. M. Bruun for goods purchased by J. P. Eagan to the amount of \$1,000;

That from the evidence goods were purchased and security extended to an amount in excess of \$3,000;

That when goods were purchased and credit extended to the amount of \$1,000, then the defendant was released, when such first \$1,000 purchase had been settled and the account liquidated;

That from the evidence, goods and credit to the amount of \$1,000, and which was first extended, was paid, and when so paid the security was released;

That from the evidence, nothing was said or done by the defendant to renew or extend his obligation or security as suggested by the contract, and it appearing from the evidence that credit to the amount of \$1,000, which was first extended, was satisfied, the defendant, Thornton, was released;

That any credit extended for the sale of goods in excess of the first \$1,000 was an obligation to be met by Eagan for which the defendant was in no way responsible;

From the evidence, the defendant, Thornton, made a small payment, which of itself in no way constituted a promise that would continue the obligation or make it incumbent upon the security to meet more than his original obligation required him to do.

In our opinion the court below erred fundamentally in its construction of the instrument in question.

The instrument sued upon is a form of guaranty or security in common use among merchants. In the contract of guaranty, as in other contracts, the first step toward determining the liability of a guarantor is to ascertain the meaning of his contract. It has been held by some courts that a strict construction in favor of the guarantor should be adopted and that all doubts as to the

interpretation of the terms used, if there be any doubts, should be resolved in favor of the guarantor. But the trend of the better modern opinion is that this contract should be construed the same as any other contract and that the same rules should be applied to ascertain the true intentions of the parties as are applied in the case of contracts generally. It is true, too, as argued by counsel for respondent, that guarantors are favorites of the law. This is a rule recognized by all courts and applicable to all circumstances, but it is a rule the legal effect of which is easily misconceived. It is not a rule of construction. Guarantors are necessary to the conduct of modern business. They usually have no direct pecuniary interest in the transaction, the fulfilment of which they guarantee, and derive no benefit therefrom. They are often in a position where they are unable to protect themselves and are therefore protected and favored by the law to the extent that the law gives them the right to stand on the strict terms of their contract. But in order that guarantors may stand on the strict terms of their contract, the meaning of the terms themselves must first be ascertained. Such ascertainment is to be arrived at not by means of the rule of favoritism but by means of the rules of construction. And because there is no legal prohibition against entering into a contract of guaranty, because for every contract which it is legal to make it is legal for a guarantor to become responsible, therefore, there is no good reason for holding, as perhaps seems to be implied by some of the authorities quoted by counsel for respondent, that in construing the contract one set of rules shall control when the original debtor is to be charged and another when the guarantor is concerned. As Mr. Brandt pertinently says in his work on "Suretyship and Guaranty," "To say that a certain set of words in a contract means one thing when the principal is defendant, and that the same words mean another thing simply because the defendant is a surety or guarantor is absurd."

The true rule for the construction of a guaranty is to determine what was the intention of the parties as disclosed by the instrument itself, read in the light of the surrounding circumstances. In the case before us there is no suggestion made by the respondent that the guaranty executed by himself and his coguarantor is limited in time or to a single transaction. In so far, therefore, it is admittedly a continuing guaranty. But the court below held that respondent insists that the instrument conditioned the guarantor's responsibility upon the extension of a credit not to exceed

\$1,000, Panamanian silver, and that when goods aggregating in value more than that amount were sold on an open account by Bruun to Eagan, his, the guarantor's liability was extinguished the moment \$1,000, Panamanian currency, had been paid by Eagan on account of such sales. In effect, therefore, the respondent argues that the guaranty was limited in respect of the credit which was to be extended to Eagan on the faith of it although unlimited as to time and the number of transactions contemplated. In support of this position counsel quotes the recital contained in the instrument, viz, "Whereas said H. M. Bruun is willing to extend credit to said Eagan * * * in the sum of one thousand dollars, Panama silver."

But in the body of the instrument are found the words: "It is hereby understood and agreed that at no time shall our, or either of our, liability exceed the amount herein stated." Surely, if it was the intendment of the guaranty to condition the guarantor's liability upon the extension of a credit not exceeding \$1,000, Panamanian currency, the words last above quoted are empty words. The instrument is precisely drawn, however, and the words "at no time shall our liability exceed the amount stated" certainly imply that it was in the contemplation of the parties that the transactions between Bruun and Eagan might at some time exceed in amount the sum of \$1,000, Panamanian silver, that more than that amount might become due from Eagan to Bruun, but that in that event the guarantors should not be liable for more than the amount for which they bound themselves in the instrument. If, however, there is any ambiguity in the terms of this instrument, any uncertainty as to its intendment, we may examine the situation and surroundings of the parties to learn what was in their minds when the instrument was delivered. The rule in this regard is well stated in the remarks of a learned judge made in the discussion of whether a guaranty was continuing or not, viz, "It is obvious that we can not decide this question without looking at the surrounding circumstances to see what was the subject matter which the parties had in their contemplation when the guaranty was given. It is proper to ascertain that for the purpose of seeing what the parties were dealing about, not for the purpose of altering the terms of the guaranty by word of mouth passing at the time, but as part of the conduct of the parties, in order to determine what was the scope and object of the intended guaranty. Having done that, it will be proper to turn to the language of the guaranty to see if that language is capable of being construed so

as to carry into effect that which appears to have been really the intention of the parties." (*Heffield vs. Meadows*, Law Rep., 4 Com. Pleas, 595.)

The evidence in this case shows that Bruun was a wholesale liquor dealer. Eagan was commencing business at Tabernilla. He, Eagan, had made a failure in business at Bas Obispo. He wished to purchase goods on credit from Bruun. Bruun refused to give Eagan credit unless the latter furnished security. Thereupon the instrument in question was executed and delivered by Thornton and Cuvillier. The record is not very clear and certain in regard to the relations between the respondent and Eagan, but it is evident that there were some sort of business relations between them and that Thornton was interested in successfully establishing Eagan in business at Tabernilla. Thornton, himself, testified that Eagan owed him \$700 and he was afraid that he would not be repaid if Eagan failed to secure credit from Bruun. This testimony of Thornton's appears to have been stricken by the trial judge, but it ought to have been allowed to stand, for it is illuminative upon the question of the relation of the parties, and of Thornton's knowledge of and interest in Eagan's business.

Eagan's was to be a going business; that is evident from the character of the business itself and from counsel's admission that the instrument under discussion is not limited as to time or number of transactions. It is apparent too from the accounts found in the record that Eagan was purchasing merchandise at frequent intervals. That is the nature of a going business and it must have been in the contemplation of the parties that the transactions between Eagan and Bruun would be of frequent occurrence and in fairly large amounts. Thornton's testimony shows that he knew that Eagan was not financially responsible. Bruun also knew it. Is it conceivable that Thornton thought that Bruun would continue to extend credit to Eagan, who had already failed in business, after Eagan had paid \$1,000 on account unless the guarantor continued to be liable for the balances due to the extent to which the guarantor bound himself? It is apparent, on the contrary, that it was the purpose of the guarantors to secure to a going business, a going, continuing credit and by the instrument used to secure such credit to limit nothing except the extent of the liability attaching to the guarantors. Such purpose, it seems to us, is inherent in the very nature of the things about which the parties were dealing. And the instrument in question is susceptible of interpretation in conformity with the purpose of the

parties so stated. The instrument, as already remarked, is carefully worded. Had the guarantors intended to limit their responsibility to several transactions not exceeding in all the sum of \$1,000, Panamanian silver, or to extinguish their liability the moment that amount had been paid by Eagan, it would have been easy for them to say so in plain, unmistakable terms.

The views here expressed are consonant with a long line of decisions by the courts. In *Matthew vs. Phelps* (61 Mich., 327), it was held that when the amount of the guarantor's liability is limited and the time is not, the guaranty is a continuing guaranty. In an early Massachusetts case, which has been cited and followed in many courts, it was held that "when from the terms of the undertaking, by the recitals of the instrument, or by reference to the custom and course of dealing between the parties it appears that the guaranty looked to a future course of dealing for an indefinite time, or a succession of credits to be given, it is to be deemed a continuing guaranty, and the amount expressed is to limit the amount for which the guarantor is to be responsible, and not the amount to which the dealing or whole credit is to be given." (*Bent vs. Harshom*, 1 Met. (Mass.), 24.)

In the case of *Laurie vs. Scholefield* (Law Rep., 4 Com Pleas, 622), the instrument in question read: "In consideration of the Union Bank agreeing to advance and advancing to R. & Co., any sum or sums of money they may require during the next 18 months not exceeding in the whole £1,000 we hereby jointly and severally guarantee the payment of any such sums as may be owing to the bank at the expiration of said period of 18 months." It was held that this was a continuing guaranty and that the words "not exceeding in the whole £1,000" were intended to express the limit of the defendant's liability, and not to prohibit the bank from making further advances.

In the case of *Bent vs. Harshom*, which has been quoted above, the guaranty was as follows: "I agree to be responsible for the price of goods purchased of you, either by note or account, by H. at any time hereafter to the amount of \$1,000." Goods were sold on the credit of the guaranty to the amount of more than \$1,000, which were paid for, and more goods were sold, when H. became insolvent, owing more than \$1,000 that had been sold on the credit of the guaranty. The court held, in conformity with its views already quoted, that the guaranty was continuing and not exhausted by the first sales amounting to \$1,000 and that the guarantor was liable for \$1,000.

The instrument before us, as has been said, is unlimited in time. It looks, admittedly, to a number of future transactions. It concerned a going business. The course of dealing between the parties shows that a succession of credits was to be extended for a time not limited by the instrument and, therefore, an indefinite time. The very words of the instrument "at no time shall our liability exceed" imply that an indefinite course of dealing was contemplated. Under such circumstances the guaranty must be deemed a continuing one in which the amounts expressed, whether expressed in the preamble or the body of the instrument, are expressed solely to limit the guarantor's responsibility and not the extent of credit. The guarantor's liability in such case would not be extinguished by payment by the original debtor on an open account of the amount to which the guarantor's liability is limited. It, therefore, follows that Thornton's liability under the guaranty did not cease and determine when sales amounting in value to \$1,000, Panamanian silver, were made to Eagan on the faith of the instrument, or when Eagan paid said sum to Bruun, but continued to the extent of said amount so long as Bruun sold goods to Eagan relying on the guaranty, or until he, Thornton, was otherwise lawfully released.

Several questions other than that of the construction of the instrument were argued by counsel. Only one of these questions, however, seems to us to merit consideration.

It appears from the evidence that during the period when the security sued upon was in full force and effect one Carnot was engaged in the liquor business at Tabernilla. Carnot wished to close out his business and arranged with Eagan to take over goods which he, Carnot, had theretofore purchased on credit from Bruun, the plaintiff, and had not paid for. Bruun consented to the transfer of these goods to Eagan and by arrangement with Carnot and Eagan credited Carnot's account with \$700, Panamanian currency, the price of the goods, and debited Eagan's account with the same amount. The respondent argues that this transaction was not in any sense a sale by Bruun to Eagan of goods, wares, and merchandise and that such transaction does not come under the terms of the guaranty. This view might be a correct one if it were true that one can sell only that which is in his immediate physical possession. But on the evidence, as it is before us, we can arrive at no other interpretation of the transaction than that when Bruun credited Carnot with the value of the goods Carnot became charged with their possession as Bruun's agent and in that capacity delivered

them to Eagan. They were, therefore, as truly goods sold by Bruun to Eagan as though personally delivered to the latter by the former.

The facts in this case as they appear in the record manifestly entitle the plaintiff to a judgment for the amount prayed for. And there can be little doubt that had the court below interpreted the instrument executed by the defendant as it is construed in this opinion that court would have determined all the issues in favor of the plaintiff. The judgment of the court below, therefore, being contrary to the law and manifestly against the weight of the evidence, final judgment should be rendered by this court in the plaintiff's favor.

The judgment of the Circuit Court is reversed and judgment ordered that the plaintiff recover of the defendant the sum of \$776.30, Panamanian currency, or \$388.15, United States currency, together with his costs in this court and costs in the court below.

Reversed.

DUNCAN *versus* HULL.

No. 99. Argued November 6, 1912. Decided March 28, 1913.

PARTNERSHIP. APPEAL FROM ORDER OF DISSOLUTION AND ACCOUNTING.

From an order of dissolution of a partnership and an accounting, the same not being a final order, and no final judgment having been rendered, no appeal will lie. Section 116 of the Code of Civil Procedure only allows an appeal from a ruling, order, or judgment which finally determines the action or proceeding.

Appeal from the Circuit Court of the Second Judicial Circuit; Hon. William H. Jackson, Judge.

The facts appear in the opinion.

W. H. Carrington and *E. M. Robinson*, for appellant. *Hinckley* and *Ganson*, for appellee.

GUDGER, C. J. This was an action begun in the Second Judicial Circuit for the purpose of dissolving a copartnership alleged to have existed between the plaintiff and the defendant, and for an accounting between the parties.

The complaint alleged the existence of such copartnership in two separate contracts, one from the Panama Railroad Company, and the other from the Isthmian Canal Commission, worked respectively by the defendant and the plaintiff. The answer denies the existence of a copartnership.

On the 28th day of June, 1912, certain parties asked the court to intervene, and this motion not being objected to, was granted and intervenors allowed one week in which to answer.

By agreement of parties the court took up the question of the copartnership, and heard evidence on this point. At the end of this hearing the defendant moved that the case be dismissed because, according to the plaintiff's own showing, any contract existing between the two was tainted with fraud. The evidence having been closed, the court found that there was a partnership existing between the two parties, and made a decree accordingly, and ordered a dissolution of said partnership and an accounting between the plaintiff and the defendant. From this order of the court, and from the failure of the court to dismiss the action for the cause above stated, the defendant asked and was allowed an appeal.

A reading of the record shows clearly that the whole question was not at issue. In fact, the intervenors, at the date when the question of partnership was heard and decided, had not filed their answer. It is impossible, therefore, to say that the decree entered by the court was a final judgment, nor did it finally determine the proceedings pending between the parties, or between those two parties and others allowed to intervene.

Section 116 of the Code of Civil Procedure reads as follows:

No interlocutory or incidental ruling, order, or judgment of the Circuit Court shall stay the progress of an action or proceedings therein pending, but only such ruling, order, or judgment as finally determined the action or proceeding; nor shall any ruling, order, or judgment be the subject of appeal to the Supreme Court until final judgment is rendered for one party or the other.

The case is remanded to the Second Judicial Circuit with instructions to proceed to final judgment in accordance with the views above expressed and the order herein made.

Remanded for further proceedings.

HINCKLEY, Receiver, *versus* ARIAS AND THE INTERNATIONAL BANKING CORPORATION.

No. 98. Argued October 28, 1912. Decided January 13, 1913.

APPEAL. WEIGHT OF EVIDENCE.

When the judgment of the trial court is plainly and manifestly against the weight of the evidence, it should be reversed on appeal.

Appeal from the Circuit Court of the Second Judicial Circuit;
Hon. William H. Jackson, Judge.

The facts appear in the opinion.

Stevens Ganson, for appellant. *C. P. Fairman*, for appellees.

GUDGER, C. J. In an action pending in the Second Judicial Circuit the plaintiff, T. C. Hinckley, was appointed receiver to take charge of a certain quantity of rum belonging to one of the litigants in said cause, and authorized to sell the same either at public or private sale and hold the money subject to the orders of the court.

It was agreed that the attorneys of record, in the case referred to, should have the right to approve or disapprove of any sale, and, in addition to this, a report was to be made to the court for its approval.

In obedience to this power the receiver advertised in certain newspapers circulating in the Canal Zone that on a day stated at the hacienda Andrade, he would sell 21,460 gallons of rum, more or less, to the best and highest bidder.

A copy of this advertisement was furnished certain prospective bidders, and, among the number, to the defendant, Arias.

When the day of sale arrived, and the parties had gathered at the place, it was suggested by the attorneys of record and defendant, Arias, that it was best to sell this rum by a method different to that advertised, namely, either by the 300-demijohn measurement or by what is known as the degree measurement, as these were the usual methods of sale used in the Republic of Panama, and that, in addition, it would give small bidders a chance to acquire some of the rum. After consultation it was agreed to make a tentative offer on the basis suggested. The rum was then offered for sale by the 300-demijohn measurement and the bids on the same were rejected. It was then offered by the degree standard and the bids likewise rejected.

When the rum was offered on the degree lots it was supposed they had on hand 7,185 demijohns of $4\frac{1}{2}$ gallons each.

It was admitted by both the plaintiff and the defendant that the rum, being stored in vessels, such as tanks, barrels, vats, etc., it was impossible to know the amount of the same.

After the bids by the demijohn lot and the degree measurement had been offered and publicly rejected the receiver then proceeded to sell the rum, as he alleges, in strict accordance with the advertisement made and furnished as before mentioned. There is some discrepancy on immaterial points in regard to this question. The receiver and four or five witnesses were introduced to establish this contention, and, in the main, the witnesses corroborated the receiver. On the other hand, the defendant, while not particularly controverting the fact that the receiver sold 21,460 gallons, more or less, of rum, stated that at the time of his bid, and when the same was knocked off to him, and when he received the rum, he was going upon the theory that there was present at the bulk sale 6,185 demijohns of rum, and that this was the amount he should have received. The measurement to the defendant showed that instead of there being this amount, or the 21,460 gallons, there were but 19,360 gallons. The defendant claims that the difference between the 19,360 gallons and the number of gallons contained in 6,185 demijohns of $4\frac{1}{2}$ gallons each should be credited to him; and this is the amount in controversy.

The receiver made a report of the sale to the court, which was adopted.

The defendant, Arias, paid to the receiver all the money save and except that in controversy, and gave the International Banking Corporation as security for the balance due, provided the court should give judgment for the same.

In making the inventory the American gallon measure was used, and defendant, Arias, was present and approved the same. When the rum was measured out to Arias the same American standard gallon measure was used and no objections taken to that method of ascertaining the quantity of rum on hand and received by Arias. Before any controversy arose as to the method of calculating the amount of rum on hand defendant, Arias, had received all the rum and removed it from the jurisdiction of the court.

The confusion in this matter arises on account of the receiver yielding to the advice of the attorneys and the application of Arias to offer the rum first by the two methods suggested. How-

ever, it appears beyond question that the sale was made finally in accordance with the advertisement, and that there were no objections by any of the parties, either at the time or until after the delivery of the rum was made.

A careful reading of the testimony in the cause convinces the court that the sale was made, as per advertisement, for 21,460 gallons, more or less; that the bid was in bulk for this amount; that the only thing the defendant can possibly claim is a reduction from the 21,460 gallons to the amount actually delivered to him, 19,360 gallons, which the receiver has already entered to his credit; that the sale was for gallons according to the American measure; and that the judgment entered by the court below is not in accordance with this view and should, therefore, be set aside.

The plaintiff-appellant, T. C. Hinckley, receiver, is entitled in this action to recover of and from the defendants-appellees, Ramon Arias F. Jr., and International Banking Corporation, the sum of four thousand five hundred and twenty-seven dollars and eight cents (\$4,527.08), and the costs of this action, and this case is remanded to the Second Judicial Circuit with instructions that a judgment be entered accordingly.

Reversed and remanded.

FITZPATRICK *versus* THE PANAMA RAILROAD COMPANY.

No. 97. Argued December 14, 1912. Decided January 31, 1913.

EVIDENCE. IMPEACHMENT.

It is not error to refuse to allow a party producing a witness to impeach his credit by showing that at other times he has made statements inconsistent with his testimony at the trial, unless the party calling such witness has been misled in so doing.

NEGLIGENCE. RAILROADS. MASTER AND SERVANT.

A railroad company is liable for the damage caused by its employees when the latter violate a rule of the company promulgated for the protection of the public whereby injury results to a third party as a direct consequence of the infraction of such rule. In such case, the employee is guilty of negligence for which the company is responsible.

TRESPASSER. LICENSEE. EXPRESS OR IMPLIED INVITATION.

One who goes upon the premises of another at the express or implied invitation of the latter is not a trespasser or bare licensee. To constitute an implied invitation, the visitor must come for a purpose connected with the business in which the occupant is engaged or which he permits to be carried on.

INTERPRETATION OF LAWS.

Unless a decision would be in direct, palpable, and unmistakable conflict with the laws which were in force in the Canal Zone prior to February 26, 1904, the same should construe those laws in harmony and in accordance with the laws of the United States of America.

MASTER AND SERVANT. RESPONDEAT SUPERIOR. RAILROADS.

At least, in so far as concerns railroad companies, within the Canal Zone, the master must be held liable for the negligent acts of his servants, agents, and employees, by the adoption of the rule of respondeat superior as that rule is understood and applied in the States of the Union.

DAMAGES. PAIN AND SUFFERING.

Damages for pain and suffering may properly be awarded by courts of the Canal Zone.

MOTION FOR NEW TRIAL. NEWLY DISCOVERED EVIDENCE.

The granting or overruling of a motion for a new trial on the ground of newly discovered evidence is a matter that rests in the sound discretion of the trial court, and a reversal should not be had for refusing such motion unless there was a palpable abuse of discretion.

Appeal from the Circuit Court of the Second Judicial Circuit,
Hon. Thomas E. Brown, Jr., Judge.

The facts appear in the opinion.

Frank Feuille and Charles R. Williams, for appellant. *Hinckley and Ganson and Felix E. Porter*, for appellee.

JACKSON, J. On the 11th day of April, 1912, the appellee, C. C. Fitzpatrick, plaintiff below, recovered a judgment in the sum of \$7,000 against the Panama Railroad Company, defendant below, on account of personal injuries received by him on June 11, 1910, occasioned by the alleged negligence of the defendant company. The complaint alleged "that defendant did on said 11th day of June, 1910, issue and grant unto plaintiff and others permission to run a special train on and over the said railroad tracks from the city of Panama to the town of Las Cascadas, and from the town of Las Cascadas to the town of Empire, Canal Zone; said special train to be run subject to orders and instructions of defendant."

"That pursuant to said permission the plaintiff did on said 11th day of June, 1910, run said special train on and over said tracks from the city of Panama to the town of Las Cascadas, and proceeded to run said train from the town of Las Cascadas to the town of Empire, Canal Zone."

"That while plaintiff was engaged in running said train from the town of Las Cascadas to the town of Empire in compliance with said orders and instructions of defendant, without negligence or lack of care on his part * * * defendant, well knowing that plaintiff was running said train at said locality, did, by its servants negligently, improperly, and carelessly cause a locomotive to run against and into said train, then and there being run by defendant as aforesaid; and at the time when defendant did cause said locomotive to run against and into said train, defendant, by its servants, was running its locomotive in a grossly careless, negligent, and unlawful manner, without displaying the proper lights and signals, and against the current of traffic; contrary to the rules which defendant did publish for the running of its trains and locomotives on its said track."

The defendant, by way of answer to said complaint, alleged in paragraph 4 thereof that said collision, which resulted in injury to the plaintiff, "was jointly due to complainant's negligence and lack of care, and the result of the violation of the well-known and established rules of the defendant company by the servants and employees of defendant in charge of the said locomotive."

Paragraph 5 of said answer alleged, by way of substantive defense, as follows:

That defendant exercised all due and proper care in the selection of its servants and employees, and in the selection of the servants and employees of the defendant in charge of said locomotive, and that defendant established and published rules and regulations for the operation of its locomotives and trains; that the employees and servants in charge of said locomotive had been examined upon and instructed in said rules and regulations and were familiar therewith; that these rules required that these employees and servants should always have displayed upon locomotives the proper lights and signals, and that locomotives and trains should not be operated against the current of traffic without a proper guard or warning to another locomotive or train using the same track; that the defendant had exercised due care and authority in examining and instructing its employees, and its employees and servants in charge of said locomotive, in the said rules and regulations, and had likewise exercised due care and authority in enforcing the observance of said rules and regulations.

And the defendant further answering says that the conduct of its employees and servants in charge of said locomotive in failing to display proper lights or signals, and in running said locomotive against the current of traffic was in violation of the established rules of the defendant company and in violation of the penal laws of the Canal Zone, and which violation the defendant company

had no means of foreseeing or preventing by the employment of ordinary care and competent authority.

The plaintiff demurred to said answer for the reason that the same did not state facts sufficient to constitute a defense to the action. The court sustained the demurrer as to paragraph 5 of the answer, and also to paragraph 4, except in so far as paragraph 4 of the answer alleged contributory negligence on the part of the plaintiff.

Thereafter, on September 29, 1911, the defendant filed its amended answer, wherein it again set forth substantially the same allegations as those contained in paragraphs 4 and 5 of the original answer, to which a demurrer had been sustained, and, in addition thereto, alleged as follows:

Defendant further says that in said collision a brakeman on the locomotive of said special train was killed, and that in so far as the negligence of defendant's employees and servants contributed to the homicide of said brakeman, the same was a violation of the penal laws of the Canal Zone.

The amended answer also alleged more specifically contributory negligence on the part of plaintiff in failing to observe the absence of lights or signals on the train of Falkner which would indicate that it had to return for the broken portion of the train.

The defendant moved to strike the said amended answer from the files, and for judgment, and the court sustained the motion to the extent of striking from the amended answer the portions thereof that were substantially the same as those set forth in paragraphs 4 and 5 of the original answer, and also the part relating to the killing of the brakeman upon the said special train. To all of these rulings the defendant duly excepted, and the exceptions to these rulings are embraced in the appellant's first and second assignments of error herein.

Notwithstanding the action of the court in sustaining the demurrer to the original answer, and in striking out the said portions of the amended answer, the defendant, upon the trial of the cause in the Second Judicial Circuit, attempted to prove by J. A. Smith, the General Superintendent of the defendant company, that engineer Falkner in charge of engine No. 658 (which collided with the train on which the defendant was riding at the time in question) had stood an examination as engineer, but the court refused to permit the witness, J. A. Smith, to testify regarding the qualifications of said Falkner. This ruling was duly excepted to, and the exception is embraced in appellant's third assignment of error herein.

Upon the trial of the case the defendant called as a witness one Joseph Williams, and then sought to lay a predicate for the impeachment of its said witness, Williams, by asking him if he had not previously made statements inconsistent with his statements upon the stand; and defendant further sought to prove by A. K. Stone, its Master of Transportation, that the said witness, Joseph Williams, had previously made statements at variance with those made by him on the witness stand. The court sustained the plaintiff's objection to the introduction of this evidence, to which exceptions were duly made, and these exceptions are embraced in appellant's fourth and fifth assignments of error. In passing upon the objection to this testimony the court said, page 91 of the bill of exceptions:

"Let the record show that counsel for defendant admits that he has not been misled in calling witness to the stand, for the reason that the witness made the same statement, as he now makes to him, last week in counsel's office, and that witness then and there denied having made the answers incorporated in the offered evidence."

We may dispose of the fourth and fifth assignments of error now by stating that the record shows that the judge of the trial court was fully justified in his statement that counsel for the defendant had not been misled in calling the witness, Joseph Williams, on its behalf. Section 356 of the Code of Civil Procedure of the Canal Zone provides as follows:

The party producing a witness is not allowed to impeach his credit by evidence of a bad character, but may contradict him by other evidence, and in the discretion of the court, in order to show that the witness has misled him into calling him to the stand, may also show that he has made at other times statements inconsistent with present testimony * * *

This section of the code, and the admitted facts, clearly show that there was no error or abuse of discretion on the part of the court in excluding the testimony with reference to the alleged inconsistent statements of Williams.

The sixth assignment of error is that the court erred in rendering judgment in favor of the appellee, which judgment was duly excepted to by the appellant. This assignment presents the question as to whether or not the plaintiff, at the time of the injuries received by him, was a trespasser or bare licensee upon the defendant's track, and, whether there was any duty owing to him by the defendant other than to refrain from wantonly or wilfully inflicting injury upon him or to exercise reasonable care and precaution to prevent injury after the perilous situation of the plaintiff became known to the defendant's employees.

For a complete understanding of this assignment of error it is necessary to refer somewhat to the evidence as disclosed upon the trial. The evidence showed that the Acting Chairman and Chief Engineer of the Isthmian Canal Commission, who was also the Vice President of the Panama Railroad Company, granted permission to the plaintiff and others to run a special train, consisting of an engine of the Isthmian Canal Commission, and coaches of the defendant company, from Las Cascadas to Panama on the night of June 11, 1910, for the purpose of permitting certain employees of the Isthmian Canal Commission and the Panama Railroad Company to attend a grand opera performance in the city of Panama. The original permission to run said special train contemplated and authorized the running thereof from Las Cascadas to Panama and return. The special train was made up in the yards at Empire and taken from there north to Las Cascadas and thence to Panama. After the opera performance, and prior to the return of the train from Panama to Las Cascadas, the plaintiff, as the conductor of said special train, received from the train dispatcher at Panama the following train order:

11.48 p. m. Engine No. 326 has until 1.30 a. m. to run extra Panama to Las Cascadas and return to Empire. *

Repeated at 11.48.

Signed A. K. S.

Pursuant to this train order the plaintiff proceeded with the said extra train from Panama to Las Cascadas on the northbound track. After discharging all passengers at Las Cascadas he proceeded, pursuant to said order, to return from Las Cascadas to Empire upon the southbound track, this being the proper track for him to take for that purpose as the evidence clearly disclosed. Prior to the extra train reaching Las Cascadas, engine No. 658, drawing an extra freight train from Colon to Panama, had stalled north of Las Cascadas, and said train had been broken in two, and the engineer, Falkner, in charge of engine No. 658, was proceeding south on the southbound track to Empire. The evidence shows that this portion of the extra freight train going south to Empire passed the extra passenger train, in charge of the plaintiff as conductor, between Empire and Las Cascadas, and that said extra freight train had no lights on the rear car thereof, the absence of which would indicate that there were other cars left behind for which the engine must necessarily return. As before stated, appellant claims that appellee was guilty of contributory negligence in going upon the southbound track thereafter. But we

find that the proximate cause of the injury was the negligence of appellant's servants; and the evidence fails to show negligence on the part of appellee contributing to the injury. After the train in charge of plaintiff, Fitzpatrick, had crossed over from the north to the south bound track and was proceeding south on said southbound track, a collision occurred with engine No. 658, which, after having left the freight cars in the yards at Empire, was improperly, negligently, and in violation of the rules of the company returning north for the remaining portion of its broken train on the southbound track. The action of the engineer in returning north upon the southbound track, against the current of traffic, was in direct violation of rule 101 of the defendant company, as follows:

Engineers returning for the detached portion, or when doubling, must not return for the remainder of train when return movement would require engine to run against the current of traffic, after having passed one or more cross-overs or switches where trains may enter main line, except by following a flagman or obtaining train orders.

The evidence shows that no flagman was sent out, and there was no protection at the crossovers to prevent engines and cars from crossing from the north to the south bound track, and also that Falkner ran his engine north on the southbound track against the current of traffic in violation of this rule without having obtained any train orders therefor. While the evidence shows that this practice had been much indulged in for a long period of time by many employees of the defendant company, it must nevertheless be said that this conduct constituted exceedingly gross negligence on the part of the defendant's employees in charge of said engine No. 658 at the time in question. It would also appear from the evidence, and from the findings of the court below, that the plaintiff in returning from Las Cascadas to Empire was but obeying the orders and directions of the defendant company in carrying out the train order which was delivered to him in Panama, and that in fact this was being done for the benefit of the defendant company. The court below said: "It appears that when the plaintiff originally made up his special train he got the cars composing it from Empire. It is a natural and reasonable inference, therefore, that the reason he was ordered to return from Las Cascadas to Empire was because the defendant wished the cars to be returned to the yard at Empire instead of being left on the tracks at Las Cascadas." It is the contention of the appellant that the plaintiff's authority to operate said special train was limited in the permission granted

by the Acting Chairman and Chief Engineer of the Isthmian Canal Commission and Vice President of the Panama Railroad Company and transmitted through the General Superintendent of the Panama Railroad Company to the Master of Transportation, authorizing the special train to be run from Las Cascadas to Panama and return, and that the direction or authorization, if it may be so called, to run the train from Las Cascadas back to Empire was unauthorized and in nowise binding upon the company for the reason that the train dispatcher at Panama had no authority to issue or to grant such an order, and that the plaintiff, Fitzpatrick, as conductor of such train, must be held to notice of such want of authority, and that in consequence Fitzpatrick, in proceeding from Las Cascadas back to Empire, was acting outside of his permission and authority and that in so doing he became a trespasser, or, at most a bare licensee, and, being such, the defendant was not liable in the absence of wilful or deliberate conduct on its part or, in the absence of negligence after the plaintiff's perilous position became known. It may well be said that there was no negligence on the part of defendant's employees after the presence of Fitzpatrick's train was discovered by the employees on engine No. 658. The negligence consisted in running north upon the southbound track contrary to the rules, and without taking the proper safeguards to protect the crossovers, which was of itself the grossest negligence. We may, therefore, dispose of this assignment of error somewhat out of its order by holding that, in our opinion, the plaintiff, in returning from Las Cascadas to Empire, was not a trespasser, nor even a bare licensee, but that he was using the proper track at the proper time pursuant to the order and direction of a duly authorized agent of the defendant company, and for a purpose connected with the business of the company. We do not controvert the proposition of law as stated by Mr. Elliot in his work on railroads, volume 3, section 1251, page 590, as follows:

That there is ordinarily no duty to a licensee except to refrain from wilful or wanton injury to him, and to use reasonable care to prevent injury to him after discovering the danger. If there is no duty to the plaintiff, or no violation of such duty, there is of course no liability.

This proposition is also clearly stated by Thompson in his commentaries on the law of negligence, and in many well-considered authorities cited by appellant in his brief, among them, *Means vs. The Southern California Railway Co.*, 144 Cal. Rep., p. 473, and *Manning, Administrator vs. The Chesapeake & Ohio*

Railroad Co., L. R. A., book 16, p. 271. The proposition of law is also well stated in *Parker, Administrator vs. The Pennsylvania Railroad*, reported in L. R. A., book 23, p. 552, wherein the Supreme Court of Indiana says:

Wilfulness does not consist in negligence; on the contrary, as illustrated in the case of *Bruun and Mann*, heretofore cited, the two terms are incompatible. Negligence arises from inattention, thoughtlessness, or heedlessness, while wilfulness can not exist without purpose or design. No purpose or design can be said to exist where the injuries have resulted from negligence, and negligence can not be of such a degree as to become wilfulness.

But further on in the same opinion the court states as follows:

The circumstances should be such as to charge the operatives with knowledge, actual or imputed, of the presence of the trespasser and of his inability to avoid injury before any duty of the company arises to require of it affirmative acts or effort to avoid injuring him. By imputed knowledge in such cases we mean such as should be implied from the conduct of the party or others within the actual sight or hearing of such operatives. It is upon such knowledge that wantonness is held to be equivalent to wilfulness.

The answer to appellant's argument in this respect is twofold:

First. That the defendant company should be charged with knowledge of the whereabouts of the plaintiff, Fitzpatrick, on the night in question, because he was operating under orders from the train dispatcher at Panama, and, as was stated by the court below, the company should be charged with knowledge at all times of the location of trains properly operating over its line. Such imputed knowledge would impose on the defendant the duty to proceed with the greatest care and caution in operating its engine north upon the southbound track against the current of traffic, and these precautions were not taken.

Second. The plaintiff was not a trespasser or mere licensee, but was operating under permission and authority granted, and for a purpose connected with the defendant's business. In *Plummer vs. Dill*, 156 Mass., 426, it was held, "to come under an implied invitation as distinguished from a mere license, the visitor must come for a purpose connected with the business in which the occupant is engaged or which he permits to be carried on. There must be at least some mutuality of interest in the subject to which the visitor's business relates, although the particular thing which is the subject of the visit may not be for the benefit of the occupant." The thirty-third American and English Encyclopedia, 756, states the law as follows:

But if his being on the company's premises is for the company's interest or benefit, as well as for his own, he is more than a mere licensee, and is upon the premises by the company's invitation, express or implied.

On page 767 the rule, as further stated, is as follows:

As a general rule a mere naked licensee on railroad tracks assumes the risks incident to his position, and except where his presence thereon is known or may be reasonably expected a railroad company is under no duty or obligation to be actively vigilant in providing against danger or accident to him; and is liable to him only for injuries caused by its misconduct or wilful or wanton injury.

We may further add that there is nothing in the evidence to show that the train dispatcher at Panama, who gave the order in question, was not acting within the scope of his authority. On the contrary, it must be presumed that he was so acting at the time. Nor does the evidence disclose that the plaintiff solicited the order from the train dispatcher at Panama for his own convenience and benefit, but, on the contrary, it is fairly inferable that the order was given to the plaintiff as a direction for the convenience and benefit of the defendant company. This clearly removes the plaintiff from the operation of the rule of law relating to trespassers or mere licensees.

We, therefore, approve the finding of the court below, as follows:

Even, therefore, if plaintiff had been a trespasser at every other stage of his trip, his movement from Las Cascadas toward Empire at the time he was injured was for the direct benefit of the defendant company and at its request. And when the plaintiff found the crossovers at Las Cascadas unprotected by any warning or danger signals he may be said to have been induced to go upon the southbound track in order to do his full duty under his orders for the benefit of the defendant.

At the very least it must be said that the plaintiff was invited upon the premises of the defendant for a purpose connected with defendant's business, and, therefore, the defendant can not free itself from obligation on the ground that it owed to the plaintiff the duty only of not wilfully or wantonly inflicting injury upon him.

This brings us, to consider the appellant's first, second, and third assignments of error, all of which may be said to be predicated upon the contention that, under the laws in force in the Canal Zone on February 26, 1904, the master is not responsible for the acts of his servant or agent if it is shown that by the exercise of proper authority and care on the part of the master he could not have prevented the act complained of. The appellant's counsel

argues with much learning and ability that the case is to be governed by the application of the laws in force on February 26, 1904, and not by the general principles of the law relating to master and servant that prevailed in the United States. In support thereof counsel cited the President's letter to the Secretary of War, dated May 9, 1904, as follows:

The laws of the land with which the inhabitants are familiar and which were in force on February 26, 1904, will continue in force in the Canal Zone and in other places on the Isthmus over which the United States has jurisdiction until altered or annulled by the said Commission; but there are certain great principles of government which have been made the basis of our existence as a nation, which we deem essential to the rule of law and the maintenance of order, and which shall have force in said Zone.

This letter, which may be said to be the organic law of the Canal Zone, has passed under the consideration of this court in the case of *Wing Chong vs. Kung Ching Chong*, wherein this court said that, "In determining the vested rights of the people in the ceded territory of the Canal Zone this inhibition is upon the courts; but in cases arising after the establishment of said courts relief on facts subsequently arising is to be given in harmony and in accordance with the established laws of the United States where life, liberty, and property are involved."

We think this is the rule that should be recognized and adopted by the courts of the Canal Zone unless our decision would bring us into direct, palpable, and unmistakable conflict with the laws which were in force in the Canal Zone on February 26, 1904. That is to say, if there is doubt or uncertainty as to the construction and interpretation of the laws here existing prior to February 26, 1904, the courts of the Canal Zone should accept and adopt that construction which more clearly harmonizes with the recognized principles of jurisprudence prevailing in the United States. Where the laws are clear and free from doubt and ambiguity it might be otherwise, and we might then be compelled to enforce the same pursuant to the provisions of the President's letter, herein referred to, notwithstanding they might conflict with our ideas of right and justice from the American viewpoint, but we should, so far as reasonably may be done, construe the laws so as to make them harmonize with the laws prevailing in the native land. In so doing we recognize the principle of International Law referred to by counsel for appellant and sustained in many well-considered decisions of the Supreme Court of the United States, that the laws, customs, and usages prevailing in ceded

territories are to remain in force and effect until altered, modified, or repealed by the new sovereignty. But we also recognize the fact that the Canal Zone is largely peopled by Americans, and that American ideas, methods, modes of living, and conduct of business, predominate in the Canal Zone, and that, so far as may be reasonably done, the laws here should be given a construction in keeping with those in the States. Looking, therefore, to the laws of the Civil Code we find article 2341 reads as follows:

He who shall have been guilty of an offense or fault, which has caused another damage, is obliged to repair it, without prejudice to the principal penalty which the law imposes for the fault or offense committed.

Article 2356 reads as follows:

As a general rule, any damage which may be imputable to malice or negligence on the part of another person, must be repaired by such person.

It is true that these provisions relate to causes arising *ex-delicto* and not *ex-contractu*, and that they recognize the old rule of the civil or Roman law that guilt is personal, and that when the responsibility for the damage can be brought home directly to the one that caused it, he and no one else is obliged to repair the damage done by him.

Section 322 of the Code of Commerce provides for recovery in cases arising *ex-contractu*, and section 4 thereof provides for indemnifying passengers for any damage they may suffer in their persons by reason of a vice in the vehicle, through their fault or that of the conductors or postillions.

It is true that the present action is one arising *ex-delicto* and not *ex-contractu*, and is not, therefore, governed by this section of the Code of Commerce. Article 2347 of the Civil Code goes a step farther than articles 2341 and 2356, and provides that all persons are responsible, not only for their own acts for the purpose of indemnifying for damages, but for the acts of those who are under their care, and here certain cases are specified, such as father and child, husband and wife, curator and pupil; artisans and empresarios and their apprentices or dependents, but said article 2347 provides that the responsibility to such persons shall cease if it is shown that by the exercise of the authority and care which their respective positions confer on and prescribe for them, they could not have prevented the act. Another provision of the law in force in the Canal Zone, however, is that provided by article 5 of law 62 of 1887, enacted by the Congress of Colombia on April 24, 1887, which is as follows:

The empresarios of railroads are responsible for the wrongs and injuries which are caused to persons or property by reason of the service of the said road and which are imputable to want of care, neglect, or violation of the respective police regulations which shall be issued by the government as soon as this law be promulgated.

It will be noted that the law just quoted applies exclusively to the empresarios of railroads, and that the liability there imposed for the negligent acts is without any qualification exempting the empresarios of railroads from liability in cases where they had no means of preventing the injury by the employment of the ordinary care and exercise of competent authority. It is, therefore, important to bear in mind this distinction between the provisions of article 2347 heretofore referred to, which contains the express provision that the responsibility of the masters shall cease if it is shown that by the exercise of the authority and care, which their respective positions confer and prescribe for them, they could not have prevented the act, and the provision with reference to the empresarios of railroads which contains no such limitation or qualification. The distinction is further emphasized by reference to article 2349 of the Civil Code, which provides that the master is responsible for damage caused by his domestics or servants in the performance of services to their masters, but that "the master is not responsible if it should be proven or it should appear on such occasion the domestics or servants have conducted themselves in any improper manner and that the master had no means of preventing it by the employment of ordinary care and exercise of competent authority. In those cases all the responsibility for the damage shall fall upon the said domestics or servants." It is undoubtedly true that said section 2349 has, as stated by counsel for appellant in his brief, a limited scope, and is intended to cover only the cases of household domestics and servants. As stated, the law, as applicable to railroads under the provisions above quoted, would appear to be without the limitations or qualifications embodied in sections 2347 and 2349.

Looking first at the decisions of the courts of Panama and Colombia construing the provisions in question we find the case of Isidoro Burgos as attorney for Felipe Ramirez *vs.* The Panama Railroad Company decided by the Superior Court of Panama and taken to the Superior Court of Bogota in 1887, where suit was brought against the Panama Railroad Company for serious personal injuries sustained on account of the plaintiff being

forcibly ejected by the conductor from one of the defendant's trains.

The gravamen of that decision was, as we read it, that the plaintiff failed to show that he sustained a contractual relation with the defendant company and that, so far as the acts *ex-delicto* were concerned, they were committed by the conductor outside of the scope of his authority; that in committing the assault upon the plaintiff the defendant's conductor was acting, not as the conductor or representative of the company, but in his individual capacity. Such facts would, of course, relieve a defendant company from liability upon well-recognized principles of the doctrine of respondeat superior in the United States. But if it be conceded that the case of *Ramirez vs. The Panama Railroad Company* did, in effect, hold that the railroad company was not liable for the tortuous act of its servant or agent, we must look to other decisions, and particularly those of *Restrepo vs. The Sabana Railroad Company*, and *Jaramillo vs. Davila*, for a more extended consideration of the Panamanian and Colombian courts in this respect. The case of *Restrepo vs. The Sabana Railroad Company* was an action against the company to recover damages for the construction of a right-of-way across the property of the plaintiff without his acquiescence and consent, as well as for the destruction of cattle and horses by trains of the defendant company. The court held that no judgment could be rendered against the company for the unlawful occupancy of the land because this constituted a penal offense, but that nevertheless the company was liable for damages for the killing of the cattle; and it would appear that the only reason that judgment in a fixed sum was not rendered against the company was that no sufficient proof was introduced to show the value of the cattle injured and killed. In the case of *Jaramillo vs. Davila* the construction of article 5 of law 62 of 1887, relating to the empresarios of railroads, came directly before the Supreme Court of Bogota in the year 1897. That case was for damages resulting from burning of plaintiff's house by reason of the escaping of sparks from the smokestack of a locomotive which belonged to the defendant. The Supreme Court of Bogota sustained the judgment of about four thousand pesos in favor of the plaintiff. In that case the defendant offered proof tending to show that the engineer was a good, skilful, prudent employee, and contended that it was, therefore, relieved from liability by reason of the provisions of articles 2347 and 2349, and the defendant insisted, as is insisted

here, that the engineer alone was responsible for the injury done. Appellant insists that the case of *Jaramillo vs. Davila* does not sustain appellee's contention for the reason that it would appear that the company itself was negligent in the location of its road near the immediate vicinity of the plaintiff's property when it should have been apparent that damage to plaintiff's property would result unless their engines were properly equipped with spark arresters. In other words, appellant insists that the facts of the *Jaramillo* case show a direct liability on the part of the defendant itself irrespective of negligent conduct on the part of its employees in the operation of the train, but the Supreme Court of Bogota seemed to take a broader view and to apply the general doctrine that the law in question was intended to make the empresarios of railroads responsible for the acts of their employees. The court stated as follows:

Without questioning the correctness of this doctrine of the tribunal, because the dependence or subordination of one man to another can not be absolute but only relative, it is clear on the other hand that the provisions of article 5 of law 62 of 1887, above quoted, without in any way mentioning the dependents, employees, or workmen of railway enterprises, make their empresarios responsible for the damages and injuries which they may cause to persons or to property by reason of the services of the said roads.

It is true, the court in its opinion said, "There is not in the record any proof whatever that any care or precaution, either on the part of the empresario or the engineer, had been taken to prevent the fire," and, standing alone, this might justify appellant's contention that the court found direct negligence attaching to the defendant, but the court went further and said, in its opinion, as follows:

What the legislature undoubtedly wished to establish was a special rule by virtue of which the empresarios of railroads (not the engineers or dependents) should respond for damages caused to persons or their property by reason of the services of the railroad themselves, a rule which has become to be complementary to that of article 2347 of the Civil Code.

The appellant insists that the last clause of the above quotation, namely, "a rule which has become to be complementary to that of article 2347 of the Civil Code" means, in effect, that the qualifications and limitations of said article 2347 of the Civil Code, exempting masters from liability where they could not, by the exercise of proper care and authority, have prevented the acts of their servants, must be considered as applying alike to said article 5 of law 62 of 1887. Appellant insists that, as article

5 is complementary to article 2347, it does not repeal it or modify it, but simply adds another class of cases to it. But we do not think that the Supreme Court of Bogota attempted to ingraft the exceptions of section 2347 to said article 5, nor do we think said article 5 would bear such a construction. On the contrary, we think there is much force in the contention that said article 5 was enacted in order to meet the conditions arising from the construction and operation of railroads in the country. In order to have a proper understanding of laws it is necessary to understand their history and origin and the conditions that produced them, and the introduction of railroads into the country would seem to have demanded a law fixing their responsibility for the acts of their servants, agents, and employees, in contradistinction to the law prevailing as to the liability of individuals therefor as prescribed in articles 2347 and 2349. Railroad companies can act only by and through their agents, servants, and employees. A corporation is an artificial person existing only by operation of law, and it acts only through authorized agents. Even in the case of an individual owner or empresario of a railroad the operation is of such a complex and diversified nature that the owner or empresario could not reasonably be expected to be ever present and in a position to exercise authority and control over the employee, consequently, it seemed proper and necessary, in the case of railroads, to adopt the rule of law herein stated.

If we look to the decisions of the Supreme Court of the Philippines we find cases apparently supporting the contention of the appellant, for instance; the case of *Johnson vs. David*, reported in volume V, pages 663 to 667, of the Philippine Reports, holds that the owner of a coach is not liable for the injuries arising from the negligence of his cochero. In that case the court said:

The question presented by these facts is, is the owner of a carriage driven by his cochero, liable for injuries growing out of the negligence of such cochero in the absence of such order * * * The defendant not having contributed in any way to the injury complained of, he is in no wise responsible for the same.

The judgment of the lower court is, therefore, hereby reversed.

But it will be noted that this case had to do with the responsibility of an individual (under the provisions of the Civil Code prevailing in the Philippines similar to those of the Canal Zone), and that it did not have to do with the liability of the empresario of a railroad, as defined by article 5 heretofore quoted. And so the case of city of Manila *vs. Gambe*, reported in volume VI,

Philippine Reports, pages 59 and 60, lays down a like rule.

Looking next to the decisions of the Supreme Court of Louisiana, construing the Civil Code of that State, we find, first, the provisions of the Civil Code of Louisiana quite similar to the provisions of the Civil Code of Panama, and, second, that they have been construed quite at variance to the contention of appellant herein. The provisions of the Louisiana Code are substantially as follows:

ART. 2315. Every act whatever of man, that causes damage to another, obligates him by whose fault it happened to repair it.

ART. 2317. We are responsible not only for the damage occasioned by our own acts, but for that which is caused by the acts of persons for whom we are answerable or of the things which we have in our custody. This, however, is to be understood with the following modifications:

SEC. 2320. In the above cases responsibility only attaches when the masters or empresarios, teachers, and artisans, might have prevented the act which caused the damage and had not done it.

Appellant, in support of his contention, cites the case of *Ware vs. The Barataria & La Fouché Canal Company*, Louisiana Reports, volume 15, book 12, page 169. In that case it appears that the plaintiff was, with his skiff, passing through the locks near the Mississippi River when he was violently seized and assaulted by the keeper of the locks under the employ of the defendant company, but a reading of the decision in the *Ware* case shows that it was considered that the employee of the defendant acted wholly without the scope of his authority in committing the assault; and the same may be said of the case of *Williams vs. The Pullman Palace Car Company et al.*, 40 La. Ann., book 47, page 87. The decision in both these cases really goes to the question of whether or not the agent was acting within or outside the scope of the business for which he was employed, and so can not be said to be inconsistent with the recognized doctrine of respondeat superior. Indeed, it may be said that the overwhelming weight of the authorities of the Supreme Court of Louisiana is directly contrary to the contention of the appellant herein. See *McCubbin vs. Hastings*, 27 La. Ann. 713, where the court said:

It may, however, be assumed that he (the agent) was competent. The defendant's liability would be none the less certain * * * If it was the master who did the wrong, the master is responsible. If it was his servant who did it, he is still responsible, for the master is responsible for the acts of his servant when done in the course of his usual employment.

Also *Black vs. Rock Island*, 125 La., page 102, where the court said, as follows:

A railroad corporation, being incorporeal and incapable of acting save through agents selected by it, when it places in the custody and under control of certain agents so selected, its depot, locomotives, and tracks, and vests in them the authority to operate the locomotives over the tracks, with a certain discretion and subject to certain instructions, but with the actual power to operate them when they please, must be regarded as represented by such agents within the sphere of authority conferred upon them, and should be held liable to the third person, injured through the negligence or improper use or abuse of the power and discretion vested in such agents.

We also find numerous decisions of the United States Court of Porto Rico against the position of appellant and sustaining the contention of appellee, herein, namely, *Hernandez vs. San Juan Light & Transit Co.*, 3 Porto Rico Fed. Rep., 138, wherein it was decided that the plaintiff, who was injured as the result of a collision of a trolley car of the defendant company with the automobile in which he was riding, could recover damages against the company; also *Garcia vs. Ponce Railway & Light Company*, 4 Porto Rico Fed. Rep., 134, where it was held that the defendant company was liable for an injury to a child who was run over by one of its cars, the employees of the railway company being negligent. The cases of *Fernandez vs. Valdez*, 4 Porto Rico Fed. Rep., 48; *Morales vs. San Juan Light & Transit Company*, 4 Porto Rico Fed. Rep., 361; *Garcia vs. Gorgetti*, 4 Porto Rico Fed. Rep., 495; *Gonzalez vs. San Juan Light & Transit Company*, 5 Porto Rico Fed. Rep., 602; *Carmona vs. Fargado Development Company*, 5 Porto Rico Fed. Rep., 209; all appear to sustain the doctrine announced in the decisions already referred to. Therefore, a careful review of the decisions of the Supreme Court of Panama and Colombia, the courts of the Philippines and Porto Rico, and particularly of the Supreme Court of Louisiana, lead to the conclusion that, at least so far as the empresarios of railroads are concerned, they must, within the Canal Zone, be held liable for the negligent acts of their servants, agents, and employees, by the adoption of the rule of respondeat superior as that rule is understood and applied in the States of the Union. Viewed, therefore, both from the standpoint of the provisions of the Civil Code as applicable here, and also from the standpoint of the general rules of negligence under the common law, we hold that the defendant company was liable for the admittedly negligent acts of its agent in causing the injury to Fitzpatrick.

The appellant contends that, notwithstanding such might be the rule of law, the court should have admitted the testimony of J. A. Smith, to prove the qualifications of engineer Falkner, in charge of engine No. 658, and refers to the case of *Jaramillo vs. Davila*, decided by the Supreme Court of Bogota, where like evidence was admitted, but this objection may be disposed of by saying that, under our view of the ruling of the court below in excluding that defense from the issues of the case, such evidence would clearly have been incompetent, irrelevant, and immaterial, and, under our view of the law, there was no error or abuse of discretion on the part of the court in excluding such evidence.

Appellant's remaining assignments of errors relate to the question of damages which were assessed to the plaintiff in the sum of \$7,000, and the action of the court in overruling the motion for a new trial. It is the contention of the appellant that the court below should not have allowed damages for physical pain and suffering, and, in this connection, reference is made to article 2341 of the Civil Code of Panama as follows:

He, who shall have been guilty of an offense or fault which has caused another damage, is obliged to repair it without prejudice to the principal penalty which the law imposes for the offense committed.

In support of his contention appellant relies upon a similar article 1902 of the Civil Code of the Philippines as follows:

A person who, by an act or omission, causes damage to another, when there is fault or negligence, shall be obliged to repair the damage so done.

And to the decisions of the Supreme Court of the Philippines construing said article. In *Marcello vs. Velasco*, decided September 17, 1908, the Supreme Court of the Philippines says:

Under article 1902 of the Civil Code no damages can be recovered for the pain suffered by an injured person at the time of or subsequent to the accident causing the injury.

We think the Supreme Court of the Canal Zone in the case of *Reese vs. Shay* has laid down a contrary rule. In that case it was held that an action of slander could be maintained in the Canal Zone without allegations of any special or pecuniary damages arising therefrom. It may be said that the codes of Louisiana, Porto Rico, the Philippines, and the Canal Zone, are practically identical in this respect, and, if it were necessary to look beyond the decision of this court in the case of *Reese vs. Shay*, we find abundant authority in Porto Rico and Louisiana in support of the appellee's contention that damages for pain and suffering were

properly awarded by the court below. In *Martinez vs. Am. Ry. Co.*, 5 Porto Rico Fed. Rep., 311, the court said:

Where there is no malice in or about the occurrence, compensatory damages are all that can be recovered, and the measure of the same is the extent of the injury done and its character, whether permanent or temporary, the amount of suffering he endured or may have to endure during life.

In the cases of *Wood vs. Valdez*, 4 Porto Rico Fed. Rep., 165; *Garcia vs. Ponce Railway and Light Co.*, 4 Porto Rico Fed. Rep., 4, and *Guzman vs. Herencia*, 4 Porto Rico Fed. Rep., 105, the juries in each case were instructed by the court that they could take into consideration, in estimating the damages for personal injury, the pain and suffering of the injured party. The Louisiana courts have similarly decided in a number of cases of which the following may be simply referred to—*Hanna vs. New Orleans Railway and Light Co.*, 126 La., 634; *Lee vs. Powell*, 126 La., 51; *Egbert vs. New Orleans Railway and Light Co.*, 128 La., 474.

In fact we can see no ground of error arising out of the question of damages awarded.

The court below expressly refrained from awarding damages on account of diminution of earning capacity as a result of the injury because the same was not specifically pleaded.

We are inclined to think that under the liberal construction of pleadings, which prevails in the Canal Zone, that this too might have properly been taken into consideration by the court in its award of damages.

Appellant also contends that the court erred in overruling its motion for a new trial on the ground of newly discovered evidence. The motion for a new trial was based upon the affidavits of E. F. Orr, train dispatcher at Panama, J. A. Smith, the defendant's general superintendent, and Charles R. Williams and Frank Feuille, appellant's counsel. The affidavit of Orr is to the effect that he was the train dispatcher of the Panama Railroad Company at Panama, and that between 11 p. m. and 11.30 p. m. of the night in question he was called on the telegraph wire by Mr. Sessions, Superintendent of Transportation of the Isthmian Canal Commission, and requested by Mr. Sessions to issue to the crew of the opera special train running orders which would permit the said train to run from Panama to Las Cascadas and return to Empire, and that the permission and train order given by him was not for the convenience of the Panama Railroad Company, "but simply because, as stated above, it was requested

by the Superintendent of Transportation of the Isthmian Canal Commission." The affidavit of Mr. J. A. Smith is to the effect that until after the trial of the case in the Circuit Court he had no knowledge of the facts relating to the permission for the return movement of the opera special train from Las Cascadas to Empire on the night of June 11, 1910. The affidavit of Charles R. Williams and Frank Feuille, appellant's counsel, is to the same effect.

The granting of a motion for a new trial on the ground of newly discovered evidence is a matter that rests in the sound discretion of the court, and a reversal should not be had for refusing such motion unless there was a palpable abuse of discretion. Before granting a new trial on the ground of newly discovered evidence a trial court should be satisfied that the evidence came to the knowledge of the moving party after the trial; that it could not have been procured by the exercise of diligence at the trial; that the newly discovered evidence is not cumulative; that it would be competent and relevant under the issues; and that it is so material to the issue that, had it been introduced at the trial, it would have caused a different judgment. We think all of these essentials were lacking in the present case. The evidence was in the possession of the train dispatcher at Panama, a duly authorized agent of the defendant, and the defendant is in law bound by the knowledge of its agent. The evidence was cumulative, and by the exercise of reasonable diligence it should have been obtained for the trial, and, if it had been introduced, it should not, in our judgment, have changed the result. The affidavits do not disclose that Fitzpatrick, the plaintiff below, asked for this order, or that he obtained it as a convenience or accommodation to him, or that he was, in any way, instrumental in having Mr. Sessions, Superintendent of Transportation of the Isthmian Canal Commission, make application therefor; and whatever the motives or causes that induced E. F. Orr, the operator, to issue the order to plaintiff, plaintiff was entitled to assume that it was issued to him by a duly authorized agent for a purpose connected with appellant's business. The appellee did not have to look for any other or higher authority, and in obeying the direction of the agent, clothed with the ostensible authority, he was performing a service for the appellant, which removed him from the category of a trespasser or bare licensee upon the tracks at the time of the collision in question. The testimony of Orr, as set forth in his affidavit, could not, in our judgment, have changed the result.

It follows that the judgment of the court below must be and is hereby affirmed, together with all costs in favor of the plaintiff in both courts.

Affirmed.

CANAL ZONE *ex rel.* versus MCINTYRE.

No. 95. Argued January 20, 1913. Decided February 5, 1913.

ATTORNEY. DISBARMENT.

An attorney who fraudulently appropriates to his own use monies entrusted to him by a client is guilty of gross unprofessional misconduct and should be disbarred.

ATTORNEY. PROFESSIONAL MISCONDUCT.

An attorney guilty of gross oppression of his clients and of professional misconduct is subject to disbarment.

COURTS. DISBARMENT.

Courts of necessity have an inherent right to strike from the rolls of attorneys the names of those who have engaged in a course of conduct hurtful to the rights and interests of clients, prejudicial to the administration of law, or tending to besmirch the fair name and honest repute of the court.

EVIDENCE IN DISBARMENT PROCEEDINGS.

In disbarment proceedings, the court may inform itself by any means of information at hand. Its inquiry is essentially a searchlight thrown upon that collection of elusive and intangible attributes which for want of a more specific name is called professional character and that inquiry should not be obscured by the mazes of technical procedure.

Petition for disbarment filed by Charles R. Williams, Assistant Prosecuting Attorney, at the relation of the Canal Zone bar.

The facts appear in the opinion.

Charles R. Williams, for relator. *C. P. Fairman* and *W. C. McIntyre*, for respondent.

BROWN, J. At a meeting held in May, 1912, a majority of the practicing members of the Bar of the Canal Zone adopted a resolution requesting the Assistant Prosecuting Attorney of the Canal Zone to commence proceedings for the disbarment of the respondent. This resolution was adopted after consideration of certain written complaints made by former clients of the respondent, which complaints in effect constituted a charge against him of gross misconduct in his office as a lawyer. Thereafter, and on or

about July 1, 1912, the Assistant Prosecuting Attorney filed a petition addressed to this court praying that respondent be disbarred. Said petition alleges the resolution of members of the bar hereinbefore referred to and sets forth four specific charges against said McIntyre, which charges may be summarized briefly, as follows:

1. That the said McIntyre had fraudulently appropriated to his own use the sum of \$200 which was part of the proceeds of a mortgage for the sum of \$500 entrusted to him for collection by one Antonio Andrade, a client;

2. That one Samuel Miller and a family named Acosta had employed the respondent to prepare a power of attorney authorizing the said Miller to represent the said family in all matters pertaining to certain lands situate in the Canal Zone and owned by them; that instead of preparing such power of attorney the respondent drew up a warranty deed conveying the said lands in fee to himself and the said Miller as joint grantees; that the said Miller and the Acosta family were unable to read the English language, and, that by falsely representing the said warranty deed to be the power of attorney he had been instructed to prepare, the respondent fraudulently induced the Acosta family to execute said deed.

3. That the said McIntyre had been guilty of gross oppression and professional misconduct with respect to certain charges made and moneys collected by way of fees from one Elitha Goban, a client.

4. That respondent had fraudulently appropriated to his own use certain sums of money entrusted to him by one Eladia Diaz, his client, for the purpose of paying installments due on a mortgage covering premises owned by her.

An order to show cause why he should not be disbarred was served on the respondent. He appeared by attorney and the matter was adjourned from time to time until on the 20th day of August, 1912, the respondent by his attorney demurred to the petition, alleging in his demurrer that the petition did not "allege any act or misconduct on the part of the said William C. McIntyre sufficient to warrant a hearing of the charges herein set forth."

The proceeding came on for hearing before this court on December 9, 1912. At that time the respondent neither appeared in person nor by attorney and it was brought to the attention of the court that some time in the month of September, 1912, the

respondent had sailed for the United States with the expressed intention of remaining away from the Canal Zone permanently. Thereupon the court appointed an attorney then present; viz, Mr. T. C. Hinckley, to represent the said McIntyre and to cross-examine such witnesses as might be produced against him. The court then overruled the demurrer theretofore filed and pursuant to section 25 of the Code of Civil Procedure proceeded to determine the matter in the absence of the respondent. After witnesses in support of the petition had been fully examined and cross-examined, the court took the matter under advisement. Thereafter the said Wm. C. McIntyre returned to the Canal Zone and on the 13th day of January, 1913, filed in this court his petition in writing whereby he prayed the court that the proceedings for his disbarment be reopened, that he be permitted to answer and to call witnesses to refute the charges against him. In his petition that the proceeding be reheard the respondent alleged that he had theretofore failed to appear and answer "through excusable negligence and surprise." Such allegation of excusable negligence and surprise is supported in the petition, among other things, by allegations to the effect that respondent had been given to understand that if he ceased practicing law on the Zone and went to the United States, the proceedings for his disbarment would be discontinued and that thereupon he did close his practice and removed to the United States. It is further alleged in the petition for a rehearing that respondent had no knowledge or notice that the matter would be heard by this court and that immediately upon learning from a private correspondent that the proceedings had been heard he returned to the Zone for the purpose of meeting the charges against him.

The motion for a rehearing coming on to be heard the Assistant Prosecuting Attorney of the Canal Zone orally in open court and by affidavit filed denied the material allegations of respondent's petition. Whereupon the court, without passing upon the issues of fact raised by the moving papers and the affidavit in reply thereto, ordered that the proceeding be reopened and that the respondent be allowed to file his answer forthwith.

Respondent having filed his answer, wherein he denied the material allegations of the petition for disbarment and affirmatively set up his version of the transactions in controversy, the proceeding again came on for hearing before this court on the 25th day of January, 1913. At such hearing Wm. C. McIntyre, the respondent, appeared in person and the Assistant Prosecuting

Attorney appeared in support of the petition for disbarment.

It is to be noted at the outset of our discussion of our reasons for the conclusion which we have reached that in his closing argument before the court, the respondent apparently assumed that this proceeding is quasi-criminal in its nature and that its object, in part at least, is to punish him for any professional wrongdoing of which the facts may prove him guilty. He admitted that in his professional relations and conduct he had probably been negligent in some respects and stated that his transactions with his client, Elitha Goban, had been reprehensible and were deserving of censure by the court, but argued that to disbar him would be too severe a punishment for his professional offenses because it would deprive him of his means of livelihood.

It is hardly necessary to point out that a proceeding for disbarment is not a criminal proceeding. From early time lawyers have been held to be officers of the courts. As such officers of the court their relationship to the public is one peculiarly demanding personal and professional probity and a reputation for honesty, truthfulness, and fair dealing. Their relationship with their clients is one of confidence, trust, and large power. Out of such relationship, therefore, duties and responsibilities devolve upon lawyers. To quote the oath administered to applicants for admission to the Canal Zone bar, it is the duty of lawyers to serve their clients "with all good fidelity" delaying no man for money or malice. It is their duty as officers of the courts to so conduct themselves towards their clients, the court, and the public as not to bring the administration of justice into ill-repute or to make the time-honored title of "lawyer" a byword and a hissing.

These things are fundamental in that code of ethics which is the professional standard of the legal fraternity everywhere. Yet this ethical viewpoint needs, perhaps, to be especially emphasized in a community like the Canal Zone. For here the population has been gathered from the four quarters of the globe. It is cosmopolitan in type, yet drawn chiefly from the proletariat. The larger portion of clients, whom a majority of the bar of the Canal Zone serve, are barely higher in the social scale than the laboring class. They are usually poor, often ignorant, and often unable to read or write the English language. Their ignorance and childlikeness, their ineptness in matters of business, their very necessities would furnish a fertile field for the predatory operations of the conscienceless men who unfortunately sometimes lurk within the ranks of the legal profession. It is evident, therefore, that among such

conditions lawyers must use and should be required to exercise a perhaps unusually high degree of care and scrupulousness in their dealings with clients. Ignorance in clients must be safe-guarded by the maintenance of a very high professional standard among their legal advisers.

In the last analysis, to the courts comes the duty of insisting by appropriate action when necessary, upon the maintenance of the sort of professional standard referred to. The primary aim, therefore, of a proceeding for the disbarment of an attorney at law is to inform the mind and conscience of the court as to the professional character of one of its officers—as to his professional and ethical fitness to advise clients and conserve their interests and to represent the courts before the world. The ultimate purpose of such proceeding is to protect the public and to uphold the honor, dignity, and good name of the courts.

Courts have, therefore, construed broadly statutes relating to disbarment proceedings. In jurisdictions where no such statutes have been enacted it has been held that courts of necessity have an inherent right to strike from the rolls of attorneys the names of those who have engaged in a course of conduct hurtful to the rights and interest of clients, prejudicial to the administration of law, or tending to besmirch the fair fame and honest repute of the court. In the Canal Zone a member of the bar may be removed from his office as lawyer by the Supreme Court, among other grounds, for any violation of his oath of office and for gross misconduct in such office. (Code of Civil Procedure, sec. 21.) What constitutes gross misconduct in the sense in which the term is used in the provisions of the code is, in our opinion, to be determined by the particular facts and circumstances appearing in each particular proceeding judged in the light of the obligations resting upon attorneys as herein set forth. And, in our view, in a consideration of the questions involved in such a determination this court is not to be limited by such technical rules of evidence or procedure as might be applicable were liberty of the person or a property right at issue. For authority to practice law is neither property nor a vested right. It is a mere license issued to persons deemed fit to act as officers of the court, and is revocable for cause shown. In disbarment proceedings, therefore, the court may inform itself by any means of information at hand. Its inquiry is essentially a searchlight thrown upon that collection of elusive and intangible attributes which, for want of a more specific name, is called profes-

sional character and that inquiry should not be obscured by the mazes of technical procedure.

We have set out in some detail the record preliminary to the rehearing, partly because such record furnished the atmosphere, so to speak, surrounding such rehearing. The preliminary record itself discloses that although the respondent had been complained of to this court because of alleged unprofessional transactions, two of which were of such a nature that if the alleged facts were true the respondent might be subjected to criminal prosecution and two of which, if unrefuted, were characterized at least by gross misconduct, yet, notwithstanding that he now avers that he has a sufficient defense to the charges made against him, he was willing to leave the Canal Zone permanently without denying or even attempting to answer them. In his argument of his motion for a rehearing the respondent made such statements that this court may reasonably and properly infer that in returning to the Zone he was not actuated so much by a desire to defend his professional character as by the wish to induce the court to so dispose of the disbarment proceedings as to make it proper for the court to issue to him, the respondent, a certificate of good and regular standing at the bar of the Canal Zone, which certificate he wanted for use as the necessary basis of an application to be admitted to practice in the courts of another jurisdiction. Moreover, in the face of the record itself, respondent's allegations in his petition for a rehearing to the effect that he had no notice that the disbarment proceedings would be heard by this court or witnesses produced appears so palpably untrue that it furnishes its own best commentary. It was inevitable, therefore, that before the actual hearing of witnesses this court should have derived from the preliminary proceedings the view that the respondent is either utterly careless of his professional reputation in the community in which he has lived and practiced, or ignorant of the ethical requirements imposed upon him by his position as an officer of the courts.

We do not think it necessary or desirable to discuss at length or in detail all of the evidence introduced at the hearing with respect to the various charges made against the respondent. Had the evidence as to charges numbered 1 and 2 been introduced in a cause in which the defendant was charged with the commission of a crime or crimes predicated thereon, we are not prepared to say that we should have held that such evidence proved the defendant guilty beyond a reasonable doubt. But the evidence does show

to our satisfaction that in his transactions as an attorney the respondent traded on the ignorance of his clients and was so careless in his management of their interests that he is an unsafe person to have such interests in his keeping. Especially is this true when the evidence relating to the charges mentioned is viewed in the light of respondent's own attitude on the witness stand and the character of his testimony when testifying in regard to his client, Elitha Goban, which matter will be more specifically referred to hereafter.

The proof relating to the dealings between respondent and his client, Eladia Diaz, shows that Eladia Diaz was from time to time delivering to McIntyre, as her attorney, sums of money in currency which were to be paid by him as installment payments on a mortgage held by one W. H. Carrington, an attorney, and covering premises owned by said Diaz. McIntyre made no entry in any book of account of the amounts so received, although he kept books of account, but issued receipts to his client, of which receipts he retained no duplicates. When the mortgage fell due and was about to be foreclosed for nonpayment of the full amount of principal and interest, McIntyre secured from Eladia Diaz the receipts which he had given her, in order, as he testified, to check up the amounts he had received with the amounts he had paid to the mortgagee. He did not return the receipts. McIntyre claims that in the foreclosure proceedings he obtained credit in the decree for all that his client had paid him, but in this she contradicts him, claiming that she had paid a total sum larger than he now admits receiving, or than was credited to her in the foreclosure proceedings.

It might be, of course, that respondent was merely negligent in the Diaz transaction; but the fact that he made no entries of the cash received is in itself a suspicious circumstance which, when coupled with his action regarding the receipts and with the further fact that women of the class of Eladia Diaz often have tenacious memories as to their own payments of cash leads us to the conclusion that her testimony in the matter is more credible than McIntyre's and that he has not accounted for the full sum he received from Eladia Diaz, and has not applied the whole of such sum to the use for which it was entrusted to him.

From the statements made by the respondent of his own volition in connection with the charge which is numbered 3 in the petition for disbarment, from his answers, both to questions propounded in cross-examination and to inquiries put to him by justices of

this court we are satisfied that the following facts are established with relation to the professional dealings between the respondent and one Elitha Goban:

Elitha Goban was arrested, together with a man found in her room. She was taken before the Empire District Judge charged with a minor offense. The charge was changed and, waiving hearing in the District Court, she was committed for trial in the Circuit Court of the Second Circuit. Bail was fixed in the sum of \$50. McIntyre charged her a total fee of \$35 for his services and received from her the sum of \$10 in cash and her bank book showing a credit of \$56.90, together with an order on the bank for the payment of such sum to McIntyre. McIntyre drew said sum of \$56.90 from the bank. Respondent then having all of her money, the said Elitha Goban could not herself furnish cash bail and was compelled to remain in jail awaiting trial. The respondent finally went to her and proposed that he would furnish her bail money if she would assign to him all her furniture as security. Having no other means of securing bail she was forced to make such assignment, notwithstanding that McIntyre then had in his possession a balance of \$30 of her money over and above the amount of his fees. Miss Goban thereupon delivered to McIntyre an order for all the furniture she possessed, which was valued at upwards of \$100 and he took the same to his house. McIntyre charged her a fee of \$20 for furnishing her bail, notwithstanding the fact that \$30 of such \$50 bail was the woman's own. She was tried in the Circuit Court, found guilty, and fined \$25, which fine was paid out of the cash deposited in lieu of bond. McIntyre thereupon refused to return her furniture, unless she, Elitha Goban, paid him \$28 in addition to what he had already received. After a period of time the matter was brought to the attention of the Judge of the Second Circuit, who sent for McIntyre and advised him that his proceedings were unprofessional and oppressive, and, if persisted in, would involve him, McIntyre, in serious difficulty, further advising him to return the woman's furniture at once without other demand of money. Respondent promised to follow the said judge's suggestion, yet, notwithstanding such promise, continued to demand and finally received the additional sum of \$28 before delivering to the woman any of her furniture.

In answering the questions which elicited the answers establishing the foregoing state of facts the respondent appeared shockingly unaware that his professional conduct in this matter was deserving of censure or oppressive in any degree. In her necessity

he had wrung from an ignorant and defenseless woman her last penny, and then had charged her a fee for a small deposit of cash as bail, part of which bail money was her own. And yet he spoke of it to the court with a nonchalance which seemed to indicate that he regarded the matter as merely a trivial and ordinary transaction. Not until after justices of this court had interrupted his testimony and advised him of their view of his dealings with Elitha Goban did he appear to harbor even a suggestion of the conception which he afterwards voiced in his argument when he said his conduct had been reprehensible.

We do not care to go further into this record or to comment on it to any greater degree. In our judgment it compels us to find that the respondent, McIntyre, had been ethically obtuse in his professional dealings, that he has violated his oath of office in that he has failed to conduct himself "with all good fidelity," and that the evidence as to the Diaz and Goban charges proves gross misconduct in his office as a lawyer. It, therefore, becomes our duty to the courts, to the bar, to the public, and to any other jurisdiction in which he may take up his residence, to order that the respondent, William C. McIntyre, be disbarred, and that his name be stricken from the roll of the lawyers of this court.

It is so ordered.

POSADA *versus* WING SANG.

No. 94. Argued October 21, 1912. Decided November 20, 1912.

WEIGHT OF EVIDENCE.

It is not the province of the Supreme Court to reverse a case on the facts unless the findings of the trial court were clearly at variance with the evidence.

TRADE FIXTURES.

In the absence of an agreement to the contrary, it is a well-recognized principle of law that fixtures installed in premises by a tenant for the purpose of trade or business are the property of the lessee. Such fixtures are an exception to the general rule that fixtures generally become the property of the lessor or owner of the leased premises.

Appeal from the Circuit Court of the Second Judicial Circuit;
Hon. Wesley M. Owen, Judge.

The facts appear in the opinion.

Hinckley and *Ganson*, for appellant. *W. H. Carrington*, for appellee.

JACKSON, J. This is an action wherein the plaintiff sued to recover damages from defendant in the sum of \$3,700, Panamanian currency, for alleged destruction of property. The complaint alleged that the plaintiff and the defendant on the 1st of June, 1907, entered into a written contract of lease for a certain building in the city of Gorgona, C. Z., a copy of which said lease was attached to the complaint and made a part thereof, and that, at the expiration of the period mentioned in said contract of lease, the same was continued from month to month by mutual consent of both parties to the contract, and that the written contract of lease was, therefore, in force and effect during all the time mentioned in the complaint. The written lease bears date of June 1, 1907, and was signed "Marco E. Posada & Brother" and "Carlos Wing Sang." The term of said lease was for 1 year from the 1st of June, 1907, for a monthly rental of 140 pesos; and it provided, among other things, that "all the improvements, which Mr. Wing Sang will make in the house, will remain for the benefit of the house itself, as well as the counters and windows, Wing Sang agreeing to keep them in the same good condition in which he may receive them."

The answer of the defendant was a general denial of each and every material allegation set forth in the complaint, and it further specifically denied the execution by the defendant of the alleged contract of lease upon which the suit was brought. The evidence established that the defendant, Wing Sang, was in possession of the premises from July, 1908, until October, 1910, at which latter time he was ordered to vacate by the landlord and plaintiff herein, and that prior to vacating on or about the 27th of October, the defendant, without the consent of the plaintiff, took out and removed all the counters and shelves that he had placed in the building for the purpose of conducting his business. There was evidence tending to show that the defendant tore down, destroyed, and carried away things not properly classified as fixtures, namely, the partitions and walls of the rooms themselves; but the evidence as to this was conflicting, and the finding of the court in favor of the defendant in this respect must be considered as conclusive.

The evidence, adduced upon the trial, tended to establish the defense that the said written contract of lease of June 1, 1907, was executed by one Carlos Wing Sang and not by the defendant; that the said Carlos Wing Sang made certain improvements and installed certain trade fixtures upon the premises, and continued to carry on his business therein until July, 1908, when the said

Carlos Wing Sang sold out his business to the defendant, Wing Sang, and that thereafter the said defendant, Wing Sang, made a verbal agreement of lease with the plaintiff for the occupancy by him, the said defendant, of said premises. The defendant contended that, according to the terms of said verbal contract, it was agreed by and between him and the plaintiff that he should buy the old shelves and other fixtures from Carlos Wing Sang and put in new ones himself, and that if, at any time, the defendant should voluntarily leave the premises, the show case and all the fixtures should belong to the plaintiff, but if the plaintiff gave him, the defendant, notice to leave, then the fixtures, etc., should belong to the said Wing Sang, the defendant. This is substantially the verbatim testimony of the defendant himself in this regard, and this was corroborated by the testimony of one Chong See Fat, who testified that he acted as Spanish interpreter between the plaintiff and the defendant in the making of the verbal contract in question. There was testimony tending to show that the defendant, Wing Sang, had been the tenant of the plaintiff in question since 1903, and that he was the real party in interest in the contract of June 1, 1907, and that he was in fact the tenant throughout under the said written contract of June 1, 1907, but there was a decided conflict of evidence in this regard; so that at the conclusion of the plaintiff's case the defendant asked the court to rule on the admission of the written contract of June 1, 1907, in evidence, and the court so ruled, denying said instrument. Thereupon the plaintiff was allowed to amend his complaint by alleging an oral contract of lease with the defendant, which he did. The question therefore presented for the decision of the court under the amended complaint was as to the terms of the said verbal contract of lease with the defendant. It may be stated that the plaintiff, having elected to file an amended complaint, pursuant to the ruling of the court, instead of resting upon his claim that there was a written contract of lease between the plaintiff and defendant, can not now be heard to complain of the action of the court in excluding the alleged written contract from the evidence. It must also follow that the finding of the court as to the terms of the oral contract of lease between the plaintiff and defendant must be considered conclusive here for certainly in the conflict of evidence which the record disclosed it can not be said that the finding of the court was manifestly against the weight of the evidence. On the contrary, it would seem to us to be fairly sustained by all the evidence as disclosed by the record in the case.

But, moreover, it must be said that when the defendant leased the premises from the plaintiff verbally on the 1st of June, 1908, as alleged in the amended complaint, that there was then no written agreement providing that the fixtures installed by the defendant should become the property of the plaintiff. In the absence of an agreement to the contrary, it must be stated as a well recognized principle of law that fixtures installed in premises by a tenant for the purpose of trade or business are the property of the lessee, and that such trade fixtures are an exception to the general rule that fixtures generally are the property of the landlord or owner of the premises.

Therefore, the questions presented as to whether or not the defendant tore down and removed only such properties as were trade fixtures, and whether or not the defendant was the real party to the written contract of June 1, 1907, and, if not, what, in fact, was the actual agreement between plaintiff and defendant as to the right of the defendant to remove the fixtures from the building, were all questions of fact passed upon by the trial judge, which the evidence in the case, as disclosed from the record, does not warrant this court in disturbing. It follows that the defendant is entitled to judgment, affirming the verdict and judgment of the court below, and for his costs.

Affirmed.

CANAL ZONE *versus* BURROUGHS.

No. 92. Argued April 15, 1912. Decided April 20, 1912.

EX POST FACTO. RETURNING TO CANAL ZONE AFTER DEPORTATION.

One convicted of a felony and who had been deported from the Canal Zone prior to May 2, 1911, can not be convicted of a violation of the Executive Order of the President of the United States, making it a felony for one who has been convicted and served a sentence of imprisonment to return to the Canal Zone.

Appeal from the Circuit Court of the First Judicial Circuit;
Hon. H. A. Gudger, Judge.

The facts appear in the opinion.

Hinckley and *Ganson* and *W. H. Carrington*, for appellant.
Charles R. Williams, for appellee.

JACKSON, J. The defendant, Joseph Burroughs, was tried in the Circuit Court of the First Judicial Circuit on April 8, 1912, upon an information filed March 25, 1912, charging him with wilfully, unlawfully, and feloniously returning to the Canal Zone, on the 16th day of March, 1912, after having been deported therefrom on the 31st day of January, 1911.

The court below found the defendant guilty as charged in the information, and it was ordered that the defendant be confined in the penitentiary of the Canal Zone at hard labor, for a period of one year.

A motion for a new trial was made and overruled and the defendant duly excepted; and thereupon the court granted a certificate of probable cause, and the case was brought to this court by appeal.

The facts disclosed in the record show that on the 9th day of June, 1908, the defendant was convicted in the Circuit Court of the Second Judicial Circuit of the Canal Zone of the offense of the infamous crime against nature and was sentenced to serve a term of three years in the penitentiary; that he was discharged from the penitentiary, and, on or about the 31st day of January, 1911, was deported from the Canal Zone; that thereafter he returned to the Canal Zone, on or about the 16th day of March, 1912.

It is the Government's contention that the defendant's return to the Canal Zone after his deportation in January, 1911, is covered by the terms of the Executive Order of May 2, 1911, which is as follows:

ART. 1. If any person, after having been convicted and having served his sentence of imprisonment in the Canal Zone, and after having been deported therefrom, returns to the Canal Zone, he shall be deemed guilty of a felony and punished by imprisonment in the penitentiary for one year and thereafter removed from the Canal Zone in accordance with the law and order relative to deportation.

ART. 2. This order shall take effect from and after this date.

(Sgd.) WM. H. TAFT.

THE WHITE HOUSE, *May 2, 1911.*

It will be seen that the Executive Order was promulgated and became effective May 2, 1911, whereas the defendant was deported from the Canal Zone some months prior thereto, namely, in January, 1911, and the question presented for our determination is, as to whether a person who was convicted and served a sentence of imprisonment, and who was deported before the enactment of

said Executive Order, and who returns to the Zone after said enactment is guilty of a felony as provided for therein.

Counsel for the defendant insist that to give the Executive Order the effect claimed by the Government would make it an *ex-post facto* law, and therefore illegal under the terms of the President's directions of May 9, 1904.

The Government contends that it was lawful to make the act of returning to the Zone a felony, regardless of whether the deportation occurred before or after the enactment of the law, and in support thereof the Government relies upon the case of *Wong Wing vs. The United States* (163 U. S., 227). In that case it would seem that the United States Supreme Court inferentially, at least, upheld the validity of an Act of Congress of October 1, 1888, as follows:

* * * that from and after the passage of this Act it shall be unlawful for any Chinese laborer, who shall at any time heretofore have been, or who may now or hereafter be, a resident within the United States, and who shall have departed, or shall depart, therefrom, and shall not have returned before the passage of this Act, to return to or remain in the United States.

In the case of *Wong Wing vs. The United States* the arrest and detention were held to be illegal because the act in question did not provide for a judicial process for determining the guilt of the party. The court did not directly pass upon the question of whether or not such act would be an *ex-post facto* law as applied to one who had departed from the United States before the enactment of the law.

But without passing upon the *ex-post facto* feature of the case at bar, it will be noted that the Act of Congress of October 1, 1888, clearly and specifically relates to "any Chinese laborer who shall at any time *heretofore* have been, or who may now or hereafter be, a resident within the United States, and *who shall have departed* or shall depart therefrom.

In the Act of October 1, 1888, Congress at least made its meaning clear and unequivocal, namely, that it was to apply to those who left the country before the enactment of the law, as well as to those who left subsequent thereto; whereas, the Executive Order of May 2, 1911, contains no clear and specific, or even inferential, reference to a person who was deported from the Canal Zone prior to the promulgation of the Executive Order.

Reading the language of the Executive Order as follows: "and after having been deported therefrom returns to the Canal Zone," we consider the two acts, namely, of deportation and of returning,

as indivisible, or inseparable, and the concurrence of both being necessary to constitute a felony.

The wording of the Executive Order would seem clearly to relate only to subsequent offenses—that is, to the joint offense of having been deported and of returning therefrom subsequent to the Order. It certainly fails to specifically relate to anyone returning who at any time theretofore had been deported from the Zone.

The Executive Order might have expressly referred to persons who had theretofore been deported after having been convicted and served a sentence of imprisonment—so as to make its meaning clear and free from doubt in this respect.

It is significant that in the Act of Congress of October 1, 1888, it was considered necessary to specifically refer to “Chinese laborers who had *theretofore* departed from the United States.”

Therefore, considering the acts of deportation and returning to the United States as both together necessary to constitute the offense, and the Executive Order not referring to any prior deportation, and the Executive Order being penal in its nature, we hold that in returning to the Canal Zone after having been deported prior to the Executive Order the defendant was not guilty of the offense provided for therein. It follows that the verdict of guilty, and the judgment and sentence of the court must be reversed, and the case remanded to the Circuit Court of the First Judicial Circuit for further proceedings in accordance with this decision.

Reversed and remanded.

CANAL ZONE *versus* ELIC.

No. 90. Submitted August 5, 1912. Decided September 18, 1912.

ASSISTING A CONVICT TO ESCAPE FROM PRISON.

One who aids an escaped convict to depart from the Canal Zone is guilty of violating section 140 of the Penal Code, and the accused, in order to be held guilty, need not be present in person to aid and assist in the escape from prison.

Appeal from the Circuit Court, Third Judicial Circuit, Hon. Thomas E. Brown, Jr., Judge.

The facts appear in the opinion.

W. H. Carrington, for appellant. *Charles R. Williams*, for appellee.

GUDGER, C. J. The defendant was tried in the Third Judicial Circuit on the charge of aiding one Bovard in escaping from the Canal Zone penitentiary, found guilty, sentenced, and appealed. It was admitted at the trial that Bovard was regularly confined under due process of law in the penitentiary at Culebra, and that he escaped from the same between the hours of 5 p. m., on the 30th and 6 a. m. on the 31st of December, 1911. The evidence disclosed the fact that the defendant was in Cristobal at an unusually early hour, 2.30 a. m., on the 31st, and seen seemingly in hiding between two colored married quarters, and, when questioned, stated that he had been to Mt. Hope for the purpose of meeting two friends who were expected on that early morning train. Some four days before the 31st the defendant purchased a boat, the "*Shamrock*," had it repaired, provisioned and manned, for the purpose, as he stated, of taking a prospecting trip. Early on the morning of the 31st, about 5 o'clock, the defendant and the prisoner, Bovard, with some others, left Cristobal in the "*Shamrock*," and were later captured by the Canal Zone officials on the coast of Panama near the Colombian line, to which latter point they were evidently making. There is no denial that the defendant purchased, manned, and provisioned the boat referred to for the purpose of taking the prisoner, Bovard, out of the jurisdiction of the Canal Zone courts. From the statement of the case it appears that a united effort had been made to secure the release of the prisoner, Bovard, and that the defendant was aware of this plot. He was indicted under section 140 of the Criminal Code, which reads as follows:

Every person who wilfully assists a prisoner confined in any jail or penitentiary * * * to escape from such penitentiary or jail is punishable, etc.

The contention is that, admitting all matters alleged, the defendant, nevertheless, is not guilty, because, under the section referred to, he must have been actually and physically present at and aiding in the actual escape of the prisoner at the very door and walls of the penitentiary.

In other words, it is contended that all depends upon the construction of the statute, and that, as the statute says "assists in escaping from the penitentiary," it must mean, and can only mean that the person assisting must be actually present and engaged in the physical act of assisting before he can come under the terms of the statute.

In volume 16 of Cyc., page 538, the subject of escape is dealt with, and subhead is as follows:

Aiding an escape may be prescribed as any overt act which is intended to assist, and which may be useful to assist, an attempted or completed departure of a prisoner from lawful custody.

And on page 542 of same work, volume 16, there is the following:

To constitute the offense of aiding escape some active assistance to the prisoner must be rendered, and defendant's act must have been useful for the purpose intended.

On the same page in Cyc. there is a note in which it appears that in a case from Ohio, where persons were prohibited from furnishing articles useful in effecting escape of a prisoner confined in jail, that the court held that when the prisoner was temporarily absent from jail, and such articles were furnished, the act came under the provisions of the statute. It is likewise held that a prisoner, confined in quarters, not a jail, temporarily, who makes his escape, comes under the provisions of the statute prescribing an escape from a jail, even though the prison so used was not public property. The question for the court to consider is, did the act of the defendant contribute to the escape of the prisoner.

If we are to take the position that no one, except a person who is actually present and aiding at the penitentiary, can be guilty under this statute, then it must follow necessarily that if A should furnish tools with which a prisoner could get through the walls of a penitentiary, and B were on the outside of the same with horses to convey him to a place of safety, B could not be convicted under this statute. Again, if the view contended for by the defendant is to be accepted, then if Bovard, the prisoner, were furnished tools with which to make his way out of the penitentiary, and A were to be on the outside with horses to convey him to the depot, a mile distant, and B at the depot with a special train to convey him to Cristobal, and at Cristobal C were to have a boat ready to convey him to foreign shores, then neither A, B, nor C would be considered as aiding him in his escape because they did not actually engage in helping to break the walls or doors or windows of the penitentiary, and yet their act contributed to his escape. In the case in point, Bovard was the prisoner, someone aided him in getting out of the walls of the penitentiary, someone aided him in getting to the train, someone aided him in getting to Cristobal, and at that point the defendant had made all arrangements necessary for him to complete his escape. This was done days before

the defendant left the penitentiary, and done evidently in obedience to arrangement understood by the defendant and Bovard and others. It was the very inducement held out by the defendant to Bovard to undertake to make an escape.

We can not take the narrow and technical view of this subject contended for which would limit its force and effect to persons and to persons only actually and physically engaged in the act of breaking from prisons and officials.

Therefore, let the order affirming and modifying be entered.

Affirmed.

THE TROPICAL TRADING COMPANY *versus* SUCCARI *et ux.*, KNOX & COMPANY, INTERVENORS.

No. 88. Argued April 8, 1912. Decided April 27, 1912.

PRIORITY OF LIENS.

A mortgagee, after maturity of the notes secured by the mortgage, and after the bringing of suit, the entry of a decree of foreclosure and the appointment of a receiver, has a prior lien upon the rents issuing from the mortgaged property in the hands of the receiver as against a general creditor who has secured an order of attachment and final judgment in his favor.

Appeal from the Circuit Court of the Second Judicial Circuit;
Hon. Wesley M. Owen, Judge.

The facts appear in the opinion.

W. H. Carrington and *E. M. Robinson*, for intervenor appellant.
Hinckley and *Ganson*, for appellees.

GUDGER, C. J. The complainant brought suit in the Second Judicial Circuit for the foreclosure of a mortgage executed by the defendant herein for the sum of \$15,000. Trial was had, and the issue found in favor of the plaintiff, and a decree of foreclosure entered. The marshal of the court sold the property and made his report to the court, which was confirmed.

Wm. H. Knox & Company moved for leave to intervene, which was allowed. They then made the motion to set aside the sale, and, after hearing, this motion was also allowed. The court then ordered a resale of the property. Pending these motions the plaintiff asked that a receiver be appointed to take charge of the rents, etc., derived from the mortgaged

property, and this motion, over the protest of the interveners, was allowed. In the meantime Knox & Company secured judgment against defendant, M. Sucari, for the sum of \$3,015.41, and obtained an attachment against the goods and chattels of said defendant, Sucari, and, among other things, levied the attachment on the rents collected from the mortgaged property by the receiver, namely, \$526.05, the amount in litigation. At the second sale, to which there seemed to be no objection, the property brought much less than the amount due on the mortgage. The question was then presented to the court as to the proper ownership of the \$526.05. The court, after hearing all the facts connected with the matter, decided that the fund in question belonged to the Tropical Trading Company. From this judgment Knox & Company appealed.

The interveners herein, Knox & Company, evidently have proceeded upon the theory that the attachment secured by them gave them a prior lien on this fund. We can not conceive, however, that it possibly could have had this effect. The property was mortgaged to the plaintiff, the time for the payment had passed, suit had been brought, a decree of foreclosure entered, and a receiver appointed, and the property in question was rents issuing from the mortgaged property; and it seems, therefore, clear that the plaintiff's title to the same is beyond dispute.

The judgment of the court below is, therefore, affirmed with the order that this money, less the commissions to the receiver, be paid by the clerk of the court to the plaintiff in this case.

Affirmed.

THE PANAMA RAILROAD COMPANY *versus* OGILVIE.

No. 87. Argued February 12, 1912. Decided March 18, 1912.

CONSIGNEE; LIABILITY FOR FREIGHT CHARGES.

The acceptance by the consignee of goods forwarded to him constitutes an implied promise to pay the carrier the freight charges thereon.

EVIDENCE; TESTIMONY FROM MEMORANDUM.

One may testify from a memorandum made by him upon an inspection of books of the creditor that the debtor owes a certain sum of money. The books of the creditor are not strictly the best evidence. The manner of allowing a witness to testify from a memorandum is a question of judicial discretion, and a judgment should not be reversed on this ground unless a party has been clearly prejudiced thereby.

REVERSAL ON TECHNICAL GROUNDS.

In accordance with section 540 of the Code of Civil Procedure, no judgment shall be reversed on formal technical grounds or for such error as has not prejudiced the real rights of the excepting party.

Appeal from the Circuit Court, Third Judicial Circuit; Hon. Thomas E. Brown, Jr., Judge.

The facts appear in the opinion.

W. H. Carrington, for appellant. *William K. Jackson*, for appellee.

JACKSON, J. On June 7, 1910, the Panama Railroad Company instituted an action in the Second Judicial Circuit seeking to recover from David W. Ogilvie, the sum of \$151.90 on account of freight charges alleged to be due the plaintiff from the defendant for a certain shipment of goods from Baltimore, Md., to Colon.

The shipment in question was made some time during June, 1907, by the Bagby Furniture Company of Baltimore, through Pitt & Scott, forwarding agents, of New York City.

Pitt & Scott, as forwarding agents, issued their own bill of lading to the Bagby Furniture Company, which was endorsed as follows, viz: "Deliver to David W. Ogilvie upon presentation of B/L. Bagby Furniture Company."

The Panama Railroad Company in turn, issued to Pitt & Scott its bill of lading for the goods in question in which W. Andrews & Company, of Colon, were named as consignees: "Order notify D. W. Ogilvie." In other words, D. W. Ogilvie, was, by the Panama Railroad bill of lading, made what is known as the "ultimate consignee."

This bill of lading showed, on its face, the articles shipped and the weight thereof; and, in addition to the articles consigned to Ogilvie as the ultimate consignee, it evidenced the shipment of two other small articles intended for W. Andrews & Company as agents for some one other than Ogilvie.

The bill of lading issued by Pitt & Scott to the Bagby Furniture Company and sent by that company to Ogilvie bears the notice, "Freight payable at destination."

After the arrival of the goods at Colon, the agent of the defendant, Ogilvie, presented to the Panama Railroad official the Pitt & Scott bill of lading and demanded the goods. Delivery was refused without the presentation of the bill of lading of the Panama

Railroad Company issued to Pitt & Scott. This latter bill of lading had been sent through the International Bank, and was to be delivered upon payment of the draft for the purchase of the goods, attached thereto.

Whether this draft embraced the item of freight charges, paid by Pitt & Scott, was the all important question of fact in the case; because the defendant, Ogilvie, took up the draft attached to the bill of lading, had the bill of lading endorsed by the International Bank, and then presented the same and received the goods from the railroad, without the payment direct of any freight charges to the said railroad company.

The court below found for the plaintiff and ordered judgment for the full amount claimed.

On appeal to this court the defendant, appellant Ogilvie, assigns as errors:

First. That the judgment is contrary to the evidence and contrary to the law; and

Second. That the court below erred in the admission of evidence over the defendant's objections.

As to the first assignment, it may be stated as a well-recognized principle of law, that a consignee, in accepting a shipment of goods, impliedly agrees to pay the carrier the amount of freight charges due thereon. The carrier may demand its freight charges from the consignor before accepting the shipment; or it may hold the goods for the lien of its freight; or it may deliver the goods to the consignee without first demanding payment, and thereupon, from the acceptance of the goods, an implied promise arises from the consignee to pay the carrier for the freight. This rule, we think, is not altered by the fact that Pitt & Scott paid the Panama Railroad the freight in the first instance; as, under the terms of the bill of lading, apparent on its face, it was the duty of the carrier to collect the freight from the consignee and return it to the forwarding agent in New York. The consignee accepted the goods with full knowledge of the fact that he was bound to pay the freight. Therefore he can not escape liability for payment to the carrier.

The question then arises did the consignee pay the freight either to the carrier or to the International Bank, which held the bill of lading with the draft attached.

It is conceded that the freight was not paid to the carrier direct, and the evidence conclusively establishes that it was not. The

evidence of the defendant himself and of his agent, George Forbes, fails to show that the amount of freight charges was included in the draft that was paid to the International Bank; while the evidence of R. E. Whalan for plaintiff shows clearly that plaintiff never received any freight charges either from defendant or the International Bank.

We think, therefore, that the court below was abundantly justified in finding that the defendant was indebted to plaintiff for the full amount claimed.

The second assignment of error, relates to the testimony of the witness, R. E. Whalan, when he stated, from a memorandum made by him, what the freight charges were, and also that, from an inspection of the books of the company, the same had not been paid by the defendant.

It was urged that this was secondary evidence, and that the books themselves should have been produced, unless the witness could testify to the facts from his own knowledge. As to what the freight charges were, that might properly be said to be a matter of computation. The bill of lading had been introduced in evidence without objection, and this showed on its face the weight, quality of goods, destination, etc., so that the question of the amount of charges was simply one of applying the established freight rates to these facts, and deducing the result. This could be done as well by the witness from a memorandum of computation as from the original books. On this point the books were not, therefore, strictly the "best evidence."

As to whether or not the defendant had paid the charges, we think it was competent for the witness to testify that an inspection of the books failed to show payment. In Wigmore on Evidence, see section 1230, it is said "Testimony by one who has examined records, that *no record* of a specific tenor is there contained is receivable instead of producing the entire mass for perusal in the court room."

To the same effect see Wigmore on Evidence, section 1244.

It would also seem to be established by well-considered authorities that the manner of allowing a witness to testify from a memorandum is a question of judicial discretion, and that a judgment should not be reversed on this ground, unless a party has been clearly prejudiced thereby. (See *Madigan vs. De Graff*, 17 Minn., 52; *Johnson vs. Coles*, 21 Minn., 108; *American Digest*, vol. 50, p. 1113.)

The Code of Civil Procedure of the Canal Zone, section 540,

provides, "No judgment shall be reversed on formal technical grounds or for such error as has not prejudiced the real rights of the excepting party."

The record in this case fails to show that the real rights of the defendant have in any wise been prejudiced.

The judgment of the court below is therefore affirmed.

Affirmed.

MONTILLA *et al.* versus HERBRUGER *et al.*

No. 85. Submitted October 23, 1911. Decided November 27, 1911.

JURISDICTION.

By section 41 of Act 1 of the Laws of the Canal Zone, the Supreme, Circuit, and District Courts of the Canal Zone can not assume jurisdiction over cases that were pending in the courts of the Republic of Panama prior to February 26, 1904, unless such jurisdiction had been surrendered by the last-mentioned courts. This applies equally to actions *in rem* and *in personam*.

Appeal from the Circuit Court of the First Judicial Circuit;
Hon. H. A. Gudger, Judge.

The facts appear in the opinion.

Oscar Teran, for appellants. *Felix E. Porter*, for appellees.

JACKSON, J. On February 6, 1911, plaintiffs-appellants filed their complaint in the Circuit Court for the First Judicial Circuit at Ancon, praying a division and partition of certain premises and appurtenances thereto situated within the districts of Ancon and Empire in the Canal Zone. On April 1, 1911, the defendant-appellee, F. C. Herbruger, filed his plea to the jurisdiction of the court, which said plea set forth substantially the fact that another suit between the same parties and for the same cause of action had been pending in the courts of Panama since July 12, 1900, and was still pending in the Supreme Court of Panama. The gravamen of the plea, as set forth in paragraphs 33, 34, 35, 36, 37, and 38 thereof is as follows:

33. * * * "That from the foregoing it will be seen that the plaintiffs by their attorney, Oscar Teran, are attempting to enforce one and the same claim in two different jurisdictions at one and the same time.

34. * * * "That this identical cause with identical

parties has been 'in the courts of Panama since July 12, 1900, when the above-named plaintiffs first attempted to have themselves declared legal heirs of Leona de Leon de Herbruger by a Panama court, to the prejudice and detriment of the above-named defendants, and is still pending in a Panama court on account of the last appeal of the plaintiffs to the Supreme Court of Panama.'

35. * * * "That this identical cause with identical parties was pending in a court of Panama, before this Honorable Court was in existence, and was still pending there on August 16, 1904, the date of the establishment of this court, and is still pending there to-day, as before stated, and as admitted in the complaint of the plaintiffs.

36. * * * "The jurisdiction of this court is prescribed and limited by the terms of Act 1 of the Laws of the Canal Zone, enacted by the Isthmian Canal Zone, by which it was constituted.

37. * * * "Section 41 of the said Act provides how, when, and in what cases a Canal Zone court may exercise jurisdiction over suits, instituted in a Panama court prior to February 26, 1904, and pending therein on said date, and reads as follows:

The Supreme, Circuit, and Municipal Courts within their respective jurisdictions shall have power to hear and determine all cases heretofore arising in the territory of the Canal Zone and now pending in the courts which possessed jurisdiction in and over such territory at the time said suit was instituted and prior to the 26th day of February, 1904. *Provided*, jurisdiction over said cases is surrendered and the cases transferred to the courts of the Canal Zone by the courts in which the cases are now pending.

38. * * * "The case at bar was instituted in a Panama court prior to February 26, 1904, was pending therein on that date, and is still pending therein; the Panama court has not surrendered its jurisdiction over the case and has not transferred the case to this or any other court of the Canal Zone."

On April 17, 1911, the court sustained the plea to the jurisdiction in a written opinion filed therein wherein, among other things, the court said:

From the beginning of the proceedings in 1900 up until a little while before the commencement of this suit all the parties were parties to litigation with regard to the same subject matter in the Republic of Panama, and the case stands to-day on the docket as unfinished business of that court. The records also show that the succession suit was pending, all the parties participating voluntarily to the same, not only in 1900, but at the time of the delimitation of the Zone in February, 1904, and that the same status exists at the present time.

Under these circumstances this court is of opinion that it is one of those cases where jurisdiction was acquired by the Panama courts; where the parties

themselves voluntarily appeared and contested in the Panama courts, and where they are voluntarily appearing and contesting at the present time in the Panama courts; and, therefore, that this court has no jurisdiction of the subject matter and of the parties.

Plaintiffs-appellants having appealed to this court, the defendants-appellees filed herein their motion to dismiss the appeal and to affirm the judgment of the lower court, and, as the facts are all admitted in the pleadings and are, as we have heretofore stated, the question arises as to the sufficiency of the plea to the jurisdiction filed in the court below and to the ruling of the court below thereon. The plaintiffs-appellants in their brief filed herein insist that notwithstanding the provisions of section 41 of Act 1 of the laws of the Canal Zone heretofore quoted that the courts of the Canal Zone must necessarily have exclusive jurisdiction in all actions *in rem*, and that the fact of the change of sovereignty from the Republic of Panama to the Canal Zone government did *ipso facto* shift to the courts of the Canal Zone on February 26, 1904, all actions *in rem*, and that the provisions of said section 41 of Act 1 of the Laws of the Canal Zone must necessarily be considered as referring only to proceedings *in personam*. We are not able to accede to this view, and think that the judgment of the court below in sustaining the plea to the jurisdiction was correct.

Without going into the question of the nature and the extent of the sovereignty which is exercised over the Canal Zone strip, it is sufficient to say that it is quite true, as stated by counsel for appellants, that "jurisdiction is defined as the power of administering justice and is exclusively a child of the law. It is the law that creates and determines jurisdiction, and where, when, and how it can be exercised." Such being the case it must follow that every sovereignty has the right by organic or statutory law to impose such limitations and restrictions as it may see fit upon the jurisdiction to be exercised by its courts. Such restriction was expressly placed upon the jurisdiction of the courts by section 41 of Act 1 of the Laws of the Canal Zone without any exception or limitation, and we must hold that it was intended to apply not only to actions *in personam* but to actions *in rem*.

As to appellants' contention that the courts of Panama are without power to execute and carry into effect a decree of its court relative to the matters involved, it might be said that section 328 of the Code of Civil Procedure would seem to provide a way for making the judgment of the courts of Panama the judgment of the courts of the Canal Zone. Said section 328 provides:

The effect of a judgment of any other tribunal of a foreign country having jurisdiction to pronounce the judgment is as follows:

First. In case of a judgment against a specific thing, the judgment is conclusive upon the title to the thing.

Irrespective of any direct provision of law authorizing an action to be brought in the courts of the Canal Zone upon the judgment of a foreign court we think such action could be brought for the purpose of making the judgment of a foreign court the judgment of the courts of the Canal Zone. The right to sue upon a foreign judgment would seem to follow necessarily in order to give effect to the provisions of section 328, and, if such an action were brought the introduction of a properly authenticated copy of a foreign judgment would, pursuant to section 328, establish conclusively the issues of the action so brought.

Moreover, the plaintiffs-appellants have, for a long time, submitted themselves to the jurisdiction of the courts of Panama, and must, therefore, be held to be estopped from raising the question of want of jurisdiction of said courts.

It follows that the judgment of the court below sustaining the plea to the jurisdiction must be affirmed, and the motion of the defendants filed herein to dismiss the appeal and to affirm the judgment of the lower court is hereby granted, with costs against appellants in both courts.

Affirmed.

GONZALEZ *versus* CANAL ZONE.

No. 84. Argued December 4, 1911. Decided January 8, 1912.

APPEALS FROM DISTRICT COURT. FORMER JEOPARDY.

A defendant in a criminal case who appeals from a finding of guilty and conviction in the District Court is estopped from raising a plea of former jeopardy upon being charged with a higher degree of the same offense in the Circuit Court.

TRIAL DE NOVO.

By section 3 of the Code of Criminal Procedure, in case of appeals from the District Court to the Circuit Court, the trial in the latter court shall be *de novo*. This means that the parties, after such appeal, are placed in the same position as though there had been no former trial.

Writ of error from the Circuit Court of the Second Judicial Circuit, Hon. H. A. Gudger, Judge.

The facts appear in the opinion

W. C. MacIntyre, for plaintiff in error. *Charles R. Williams*, for defendant in error.

BROWN, J. On April 17, 1911, the plaintiff in error, plead guilty in the District Court at Empire to the charge of having committed an assault and battery on the 16th day of April, 1911, upon one Omar Chan. The District Judge imposed a sentence of 25 days in jail. The plaintiff in error, defendant in the court below, thereupon appealed from the judgment of the District Court to the Circuit Court for the Second Judicial Circuit.

Upon the perfection of the appeal, the Assistant Prosecuting Attorney of the Canal Zone filed in the Second Circuit Court an information against Gonzalez containing two counts. The first count of the information charged that on the 16th day of April, 1911, Gonzalez committed the offense of assault and battery upon Omar Chan and the second count charged that on the 16th day of April, 1911, Gonzalez did commit "an assault upon Omar Chan by means of force likely to produce great bodily injury to the said Omar Chan, to wit, with a stone weighing about three pounds, then and there held in the hand or hands of the said E. Gonzalez."

To this information the defendant entered a plea of "not guilty and former jeopardy," alleging that he had been charged and convicted in the District Court upon the identical facts upon which the information was based, and that he was present in the Circuit Court ready to be tried upon his appeal. The Circuit Judge thereupon ordered that the appealed case be merged with the charge contained in the second count in the information, and that the trial proceed upon the information. After hearing the evidence the court found that the plea of former conviction did not avail the defendant and that the defendant was guilty as charged in the second count of the information. Upon this verdict the court sentenced the plaintiff in error, defendant below, to serve 3 months in the penitentiary.

The record is before this court for review upon a writ of error.

There is no contention that the evidence was not sufficient to sustain the Circuit Court's verdict on the general issue.

It appears from the bill of exceptions annexed to the writ that the defendant below was arrested, charged, and convicted in the District Court upon the identical facts testified to in the trial before the Circuit Court, and that the record of the District Court was admitted in evidence in the Circuit Court. The plaintiff in

error was convicted of a misdemeanor in the District Court and of a felony in the Circuit Court.

The main question presented to us for determination therefore is whether the judgment of conviction in a District Court from which the defendant appeals to the Circuit Court is a bar to his prosecution and conviction in the Circuit Court on an information charging a different crime predicated on the same state of facts as was in evidence in the District Court.

Section 3 of the Code of Criminal Procedure provides that in the case of appeals from the District Courts to the Circuit Courts, the trial in the Circuit Court shall be *de novo*. The words "*de novo*" as used in this section are undefined in the Code of Criminal Procedure. In the Code of Civil Procedure, however, it is provided with reference to perfected appeals of civil causes from the District Court to the Circuit Court that "the action when duly entered in the Circuit Court shall stand for trial *de novo* upon its merits in accordance with the regular procedure in that court as though the same had never been tried." (Sec. 68, Code of Civil Procedure.) The same section provides that the perfected appeal in a civil case operates "to vacate the judgment of the District Judge.

The wording of the section of the Code of Civil Procedure above quoted is of importance in construing the words "*de novo*" as found in section 3 of the Code of Criminal Procedure, for the former section provisions are almost identical in one respect with the provision of the Criminal Code with reference to new trials in the Circuit Court. The quoted section of the Code of Civil Procedure provides that the appealed case shall proceed in the Circuit Court "as though the same had never been tried," while section 217 of the Code of Criminal Procedure provides that "the granting of a new trial places the parties in the same position as if no trial had been had." It is apparent that the perfected appeal from the conviction and sentence in the District Court operates to grant a new trial in the Circuit Court and from the analogies of the quoted sections of the two codes of procedure it would seem that the perfected appeal from the conviction and sentence in the District Court "vacates the judgment of the District Judge" and on the trial "*de novo*" in the Circuit Court "places the parties in the same position as if no trial had been had.

Under these conditions is the conviction appealed from a bar to a prosecution for a different crime involving the same facts

when the trial *de novo* is had in the Circuit Court. This court has answered this question in its opinion in the case of Canal Zone *vs.* Clark. (C. Z. Rep., vol. I, p. 128 *et seq.*) In that case the defendant was convicted in the Third Judicial Circuit Court on the charge of grand larceny. On his appeal the appellate court granted the defendant a new trial. A new information was thereupon filed containing not only the original charge of grand larceny, but also counts charging "receiving" and "burglary." On the new trial the defendant entered the plea of former jeopardy.

This court sustained the trial court's finding of guilty in the second trial, quoting with approval authorities cited in the Cyclo-pedia of Law and Procedure, volume 12, on page 212 *et seq.*, as follows:

When a new trial is granted on motion of the defendant, and the verdict and conviction set aside, the defendant has thereby waived his right and is estopped to plead the former conviction as a bar to a new indictment. The accused is estopped to plead a prior conviction when his conviction has been reversed for error on an appeal or writ of error brought by himself. A defendant waives his right to plead former jeopardy by appealing for a new trial. When, therefore, a new trial is granted in the appellate court and he is reindicted or tried on the original indictment, he can not plead the conviction which was reversed on appeal as a bar to the prosecution.

It is objected, however, by the plaintiff in error, that the Code of Criminal Procedure provides that a criminal case appealed from the District Court to the Circuit Court "shall be tried on the original complaint and warrant." In trials in the District Court the complaint and warrant stand in that court in lieu of an information. In conformity, therefore, with the reasoning in the Clark case when the plaintiff in error, defendant in the court below, perfected his appeal he placed himself in the same position as if he had not been tried and thereby waived his right to plead former jeopardy and was "estopped to plead the former conviction as a bar to a new" information.

It follows from the foregoing that the writ of error must be quashed, the untried appeal ordered "*nolle prossed*" and the judgment of the Circuit Court affirmed.

It is so ordered.

Affirmed.

CANAL ZONE *versus* JAMES MURRAY.

No. 82. Argued April 24, 1911. Decided May 1, 1911.

HABEAS CORPUS. CONTEMPT OF COURT.

One improperly committed for contempt of court may have recourse to the writ of habeas corpus to obtain his liberty.

CONTEMPT OF COURT. JURISDICTION.

Under section 58 of the Code of Civil Procedure and section 131 of the Penal Code, a District Judge is without jurisdiction to impose successive penalties for successive refusals to answer the same question. Such courts are of limited jurisdiction and can only act within the limitations of the laws defining their jurisdiction.

Application for writ of habeas corpus.

The facts appear in the opinion.

S. B. Dannis for petitioner. *Charles R. Williams* for respondent.

BROWN, J. This cause comes before this court on an application for a writ of habeas corpus and the return of the marshal of the Supreme Court to the defendant's petition.

It appears that on the 12th day of April, 1911, the defendant was tried in the District Court, District of Ancon, on the charge of disorderly conduct. During the course of the trial, while the defendant was voluntarily testifying in his own behalf, the District Judge propounded to him a material question which the defendant failed and refused to answer. Thereupon the District Judge summarily fined the defendant the sum of \$3 as punishment for a contempt of court. Immediately thereafter, the District Judge again propounded to the defendant the same question which defendant had before refused to answer and upon defendant's second refusal to answer the District Judge summarily imposed a fine of \$5 as punishment for a contempt of court. The like operation was repeated until, as appears from the amended commitment set out in the Marshal's return, the District Judge had imposed summarily upon the defendant fines aggregating \$28 and jail sentences aggregating 48 hours, a "\$3 fine for the first contempt of court and \$5 fine each for the next three contempts, and \$5 and 24 hours each for the next two contempts of court." Defendant having failed to pay said fines was thereupon committed to jail.

It further appears that on the 13th day of April, 1911, defendant was taken from the District jail, was again brought before the District Judge and upon being asked the question he had before refused to answer, answered it; thereupon the District Judge revoked the jail sentence of 48 hours.

The defendant alleges that the refusals to answer herein set forth were not separate or separable offenses but on the contrary, a single continuing offense and that in imposing the several successive penalties the District Judge acted without authority of law.

Section 131 of the Penal Code of the Canal Zone declares that every person guilty of a contempt of court of the several kinds enumerated in the section is guilty of a misdemeanor. Subdivision 6 of this section specifies as contempts which are declared misdemeanors by the section "the disobedient and unlawful refusal to be sworn as a witness, or when so sworn the like refusal to answer material and proper questions." The same section also provided that "an act which besides being a contempt may also be a crime is punishable as a contempt and as a crime."

Section 58 of the Code of Civil Procedure provides that District judges may summarily impose a fine not exceeding \$5 or sentence to imprisonment for a period not exceeding one day or impose both of such punishments, upon a person guilty of misbehavior in the presence of or so near the District Judge as to obstruct him in the performance of his judicial duties.

The two sections of the codes quoted are not contradictory each of the other nor did the adoption of section 58 of the Code of Civil Procedure repeal the provisions of section 131 of the Penal Code. The distinction lies in the fact that the former section provides for punishment summarily imposed, while the provisions of the Penal Code declare the contempt to be a misdemeanor and the contempt, therefore, being a misdemeanor, is punishable under this section only upon sworn complaint filed and after trial duly had. This distinction is common to the law of many jurisdictions, for law-making bodies have deemed it wise to limit carefully the authority of court and judges to impose summary penalties. The reason for such limitation is plain: Judges, being human, are subject to anger like other men and the very nature of contempts committed in the face of the court is such that they may arouse a judge's anger to such a degree that if he act summarily he may not act with the deliberateness and calmness necessary to the imposition of just punishments. The law-making power

in the Canal Zone apparently intended so to limit the summary authority of district judges and to require that persons charged with a more serious kind of contempt should be proceeded against as for a misdemeanor with their rights protected by all the legal safeguards incident to a regular trial.

In the case before the court, it is clear from the petition and the Marshal's return that the District Judge proceeded summarily under the provisions of section 58 of the Code of Civil Procedure. It is equally clear that the aggregate fines imposed even exceed the largest fine which can be imposed pursuant to the provisions of the Penal Code. It would seem too, that if successive separate contempts can be predicated upon successive refusals to answer the same identical question then fines and penalties might be piled up in a few moments *ad infinitum* and the limitation upon the authority of the judge contemplated by the section be thus set absolutely at naught. Such a construction of the law would place a fearful weapon in the hands of any judge inclined to be unjust, and the number of contempts committed and punishments imposed would be limited only by the number of times the judge chose to repeat the unanswered question.

This case is to be distinguished from a case where a party is committed to jail until he answer proper and material questions or otherwise purge himself of a contempt. The commitment in such case is within the authority of courts of record having general common law jurisdiction or may be authorized by statute. But the District Courts of the Canal Zone are courts of limited jurisdiction which can only act within the limitations of the laws defining their jurisdiction.

It may well be, however, that after a proper commitment pursuant to section 58 of the Code of Civil Procedure the defendant should be allowed to purge himself of his contempt. It seems that in some sort he was permitted so to purge himself in the case before the court, but such action did not operate to discharge him from all the penalties imposed.

From the foregoing it is apparent that the District Judge was without authority of law to impose the successive penalties set forth in the petition and in the marshal's return with the exception of the first fine of \$3. The commitment to jail for the nonpayment of such fines was therefore equally without authority of law.

The defendant should therefore be released from custody under the commitment and amended commitment.

Affirmed.

ESPINOSA *versus* CARBONE, SCHUBER, Intervener.

No. 100. Argued January 24, 1913. Decided May 24, 1913.

CONSTRUCTION OF DEEDS.

It is an elementary principle that, in respect to boundaries, deeds must be construed strictly against the grantor and liberally in favor of the grantee.

PRESCRIPTION. ESTOPPEL.

A grantor in a deed or any of his successors in interest, on the principle of estoppel, can acquire no rights in and to any of the property conveyed by such deed by prescription against the grantee or his successors in interest.

OCULAR INSPECTION, DETERMINING EFFECT THEREOF ON APPEAL.

An appellate court should set aside a judgment based partly on an ocular inspection, unless same is supported by the testimony of witnesses. When a judgment of a trial court is based solely or partly on a view unsupported by other evidence it can not stand.

HIGHWAY. USE.

A grant in a deed to the edge of a highway carries with it a grant to the middle thereof and a right of use.

Appeal from the Circuit Court of the First Judicial Circuit;
Hon. William H. Jackson, Judge.

The facts appear in the opinion.

Hinckley and Ganson, for appellant. *Oscar Teran*, for appellees.

THOS. E. BROWN, J. This cause first came to trial in January, 1911, in the First Circuit Court, Judge Owen presiding. Judgment was entered in favor of the defendant and the intervenor. Such judgment appears to have been granted mainly for the reason that no sufficient description of the tract of land involved was contained in the complaint nor any map introduced in evidence by which the land could be identified. This first judgment was vacated by the trial court and the cause dismissed without prejudice. Thereafter new pleadings were filed by all parties and the action came on for trial in said circuit before Judge Jackson on the issues raised by the new pleadings, and judgment was entered dismissing the complaint on the merits. Thereupon the plaintiff moved for a new trial on the ground that the judgment was contrary to the law and against the weight of the evidence and on the further ground of alleged newly discov-

ered evidence. From the denial of this motion plaintiff appeals to this court.

The complaint alleges, among other allegations, that in and by a certain warranty deed of January 22, 1887, the plaintiff acquired from Henry Schuber and brother, who were the predecessors in interest of the intervenor herein, a certain tract of land in the Administrative District of Ancon, having for its southern boundary the old road of Cruces from the bridge of the Rio Hondo to the place known as Guadalupe, and that between the said Cruces road and a certain barb-wire fence of the plaintiff, to the north thereof, is a strip of land varying from 10 to 200 feet in width, comprising altogether 10,844.9 square meters or 1,844 hectares; that this strip of land passed to the plaintiff under the warranty deed aforesaid; that he had remained continuously the owner of and in possession of said tract since the date of said conveyance. The complaint further alleged that while plaintiff was so seized, the defendant on or about the 10th day of July, 1910, without any right or title entered into possession of the strip of land above referred to and ousted and ejected the plaintiff therefrom and still withholds the possession thereof from the plaintiff.

The complaint specifically describes said strip of land and refers such description to a map filed with the complaint and marked Exhibit B; and it further alleges that for more than 50 years the said Cruces road has been a highway devoted to public use and has continuously afforded the public and the plaintiff in particular a way of ingress to and egress from his property, conveyed to him by said deed and called therein "La Union;" that defendant having purchased certain lands on the opposite side of the said Cruces road from the lands of the plaintiff, or having entered into contract for the purchase thereof, and taken possession of same, constructed a fence closing the lands of plaintiff between said road and plaintiff's before-mentioned fence, thereby depriving the plaintiff of the use of said road and interfering with and impeding free ingress to and egress from the plaintiff's lands to his irreparable damage. The land referred to as purchased by the defendant was purchased from the intervenor.

The complaint prays for damages, for possession of the property from which it is alleged he has been ejected, and for a mandatory injunction directing the removal of the various obstructions complained of.

The answers of the defendant and intervenor set up a general denial of the material allegations of the complaint and among other defenses allege prescription and nonuser.

At the trial before Judge Jackson the record of the testimony taken at the first trial was introduced in evidence by agreement between the parties and additional witnesses were examined and evidence introduced.

In its opinion annexed to the bill of exceptions the trial court among other things held substantially as follows:

1. That the southern boundary as described in the deed from Henry Schuber and brother to the appellant herein is indefinite and uncertain.

2. That if such boundary were intended by the deed to be the Cruces road, the part of the road contiguous to the land in question is not now susceptible of definite location as a boundary.

3. That the actual boundary of the land in question as fixed by the parties and by long-continued use is the barb-wire fence herein before mentioned.

If these conclusions are justified by the law and the facts the trial court did not err in determining the issues against the plaintiff. The questions involved in the conclusions above numbered 1 and 2, are however fundamental to this case and if those questions be answered in favor of the plaintiff, then the additional facts established by the record entitle him to the injunction prayed for in his complaint.

It therefore becomes necessary to discuss the question of the proper construction of the portion of the said deed which sets out the southern boundary. That portion of the description reads as follows:

On the south the old road of Cruces from the bridge of Rio Hondo to the place known as Guadalupe. In the small part of the road which is without a rocky covering will be placed posts. This boundary divides the land which we sell which remains to the north of the old Cruces road or to the right going from Panama to Cruces from that which I reserve to myself. The sign posts will be of stone marked with the proper lettering put up by the seller. The southern part or that on the left-hand side of the old road from Panama to Cruces which the vendors, Messrs. Henry Schuber and brother reserve will continue being known as Juan Diaz Caballero, and the part which they sell which is at the north or to the right-hand side of the said road will be known as "La Union."

It is an elementary principle that in respect to boundaries, deeds must be construed strictly against the grantor and liberally in favor of the grantee. This principle is so firmly established that it needs no citation of authority to support it. But even without the application of this principle it is difficult for us to see

that there is any uncertainty involved in the description quoted. The trial court however appears to be of the opinion that because the deed does not employ such words as "abutting upon" said Cruces road or "immediately contiguous thereto" but instead uses the language quoted, there is no assurance that it was intended to make the Cruces road itself the actual southern boundary of the land conveyed. The trial court further raises the question whether in view of the words employed it was not intended to mean that the actual southern boundary was along such line "reasonably north" of the Cruces road as should be established and agreed upon by the parties themselves. And it is partly because of the uncertainty which it finds in the description that the trial court decided that the barb-wire fence referred to is the actual southern boundary of the property.

We can not agree with the trial court's reasoning in this respect. An existing road or way is one of the most reasonable and natural means by which to bound property conveyed. And there is no question whatever, in our opinion, that both grantor and grantee intended that the conveyance referred to should say what in our judgment it does say, namely, that the actual southern boundary of the land in question was and should be the Cruces road.

This road existed and was known at the time of the conveyance. The evidence so shows. But there was a small portion of the road which was "without rocky covering" and which with the lapse of time might become effaced. It was therefore provided in the deed that posts should be placed in this small portion to serve as monuments. The evidence does not show that these posts were ever erected but the trial court was of the opinion that the barb-wire fence and its posts might have been intended to serve in lieu of the posts provided for in the deed. This opinion however, as has already been stated, was arrived at, partly at least, because of the trial court's uncertainty as to the proper interpretation of the description before referred to, and with this uncertainty disposed of, the evidence on this question does not appear to sustain the trial court's conclusion.

The deed from the Schubers to Espinosa, the appellant, fixed the actual southern boundary of the land conveyed as the old Cruces road. The registration of the deed effected the tradition of the property described and had the same force and effect as livery of seizen under the common law. It therefore follows as a matter of law, on the principle of estoppel, that no rights in any

of the property embraced within the terms of the deed could be acquired by prescription by the grantors or those claiming under them, namely by the intervenor and the defendant.

The foregoing conclusion as to the actual southern boundary line of the property conveyed by the deed makes it necessary for us to determine whether the line of the old Cruces road was established by the evidence. Here we are confronted by two difficulties. This court has announced in many decisions that it will not disturb the findings made by the trial court unless such findings are manifestly against the weight of the evidence. But it may be said in answer to this difficulty that after reading the trial judge's opinion it is apparent to us that he would probably have reached a different conclusion on the facts had he construed the descriptive portion of the deed referred to as herein interpreted.

The second and the more serious difficulty is as to the weight and effect to be given to the ocular inspection of the premises in question which the record shows was made by the court below. The map marked Exhibit B was introduced in evidence. It shows thereon the line of the Cruces road between the points in dispute as it was claimed to exist at the time of the trial. This line was actually located on the ground by the testimony of the engineer who made the map, by the testimony of an engineer in the employ of the Isthmian Canal Commission, and by the evidence of many reputable persons. There appears in the bill of exceptions no considerable testimony by witnesses on which the incorrectness of the line of the old road as shown on Exhibit B can be predicated. And the trial court was evidently of the opinion that the great preponderance of the evidence established the correctness of such line. Indeed the record shows that the trial judge stated when denying the plaintiff's motion for a new trial that although the Cruces road, as shown in the map marked Exhibit B, was by the preponderance of the evidence "engineeringly correct" he would nevertheless find that the dividing line was the fence of the plaintiff and that the Cruces road, as shown on the map, was only a paper boundary. Yet notwithstanding such preponderance of evidence the trial judge says that on the occasion of his ocular inspection there were several places along the line of the road as shown on said map where he could find no trace whatsoever of any road. The trial court also refers in its opinion to evidence which apparently consisted of statements made by persons present at the time of the ocular inspection. These statements do not appear in the bill of exceptions which is before this court and we

have no means of knowing their materiality or testing their value.

Now the weight to be given as evidence to ocular inspections has been a much mooted question. In jurisdictions where there is no real appellate system the problem does not present serious difficulty. But where there are appellate courts which determine causes as the same are reproduced in a written record, there often arises, as there does in this case, considerable question. What the trial court saw by means of its ocular inspection is not and can not be reproduced for this court as evidence. The trial court thereby became a silent witness in the case burdened with testimony unknown to this court. It was swayed more or less by testimony not reproduced here. Ought, therefore, its view to have determining weight as evidence against the preponderance of the record-evidence, when the cause is considered by the appellate court?

Prudence and a regard for the maintenance of the rights of appellate courts to know the facts require us to answer this question in the negative.

In this regard the following statement by a learned author is supported by reason and authority, viz:

The true solution of this difficulty is that cases where there has been a view stand, on appeal or error, on a special footing; that although what the jurors have learned through the view is evidence to be considered by them—yet, on grounds of public policy, having reference to the known imperfections which attend the conclusions of jurors and even judges in the haste of *nisi prius* work a reviewing court should set aside a verdict based partly on a view, unless it is supported by substantial testimony delivered by sworn witnesses. (Thomp. Trials, sec. 902.)

Moreover we are of the opinion both on principle and authority that trial courts are not justified in disregarding the other evidence, and that when their verdict, based solely or partly on a view, is not supported by the other evidence, it can not stand. (Hartman vs. Reading Railway Company, 13 Atl., 774; Washburn vs. Milwaukee Railway Company, 59 Wis., 364; Flower vs. Railway Company, 132 Pa., 524, 19 Atl., 274.)

Looking at the case as a whole, therefore, it appears that the court below was right when it said that the old Cruces road, as shown on the map marked Exhibit B, is "engineeringly correct." We are of the opinion too that the evidence and the law establishes the lines so shown as the actual southern boundary between the points in dispute of the land conveyed by the Schubers to the appellant.

The appellant has requested that judgment absolute be rendered by this court. It appears that the litigation has been long and involved, and the evidence contained in the record justifies final judgment at this time.

There is no defense set up by the answers other than the question of fact that requires special consideration. Even if the Cruces road had been abandoned as a public highway before the date of the conveyance by the Schubers to Espinosa there is ample evidence that through all these years the road at the place in dispute has been at least in use as a private way, utilized by Espinosa, his grantors and others for themselves, their cattle, and their employees.

Under the circumstances the grant to the edge of the road carried with it a grant to the middle of the road and a right of use. And the grantors and those claiming under them are estopped by their warranty from asserting any claim or interest adverse to the rights conferred upon the grantee by the deed.

On the other hand there does not appear to be evidence on which to found an award of damages to the appellant. There is no contention, however, that the defendant did not commit the acts complained of in the complaint.

It follows from the foregoing that the judgment of the lower court should be reversed with costs to the appellant in both courts, and a decree entered establishing the plaintiff in possession of the disputed premises. Such decree should also contain the mandatory injunction prayed for in the complaint. Remanded for entering proper decrees in accordance with this opinion.

Reversed and remanded.

CANAL ZONE *versus* LUIS MENA.

No. 101. Argued November 6, 1912. Decided November 11, 1912.

HABEAS CORPUS. JURISDICTION.

The President of the United States in the exercise of the political authority conferred upon him, may order the arrest and detention of an individual and his incarceration in the Canal Zone. In so doing it is unnecessary that any warrant issue for such arrest. Courts of the Canal Zone are without jurisdiction to grant a writ of habeas corpus in such a case. It is possible that the President might not be vested with such powers in so far as concerns actual inhabitants of the Canal Zone.

Application for writ of habeas corpus.

The facts appear in the opinion.

Hinckley and *Ganson*, for petitioner. *Frank Feuille*, for respondents.

THOS. E. BROWN, J. The petitions of the applicants in the above-entitled proceedings allege that the petitioners are unlawfully restrained of their liberty by the Chief of Police of the Canal Zone and his subordinates and that such restraint is not in pursuance of any writ or process of any kind issued by any court, judge, or other competent authority of the Canal Zone. Upon such allegations, writs of habeas corpus were granted by the Chief Justice and made returnable before this court.

The return of the Chief of Police to the writs alleges in substance that the applicants are held under orders from the President of the United States issuing through the Department of War and that they are only under such restraint or surveillance as is necessary to require them to remain within the limits of the Canal Zone; that they were engaged in a revolution against the constituted government of Nicaragua; that it became necessary for the United States to land its armed forces in Nicaragua for the protection of American interests and the American Legation; that as a necessity for the furtherance of these purposes the armed forces of the United States engaged in hostilities with the armed forces of the applicants; that during the hostilities the applicants surrendered to the commander of the forces of the United States, upon condition that they be brought to the Isthmus and remain within the limits of the Canal Zone; and that the applicants were thereupon placed upon a warship, brought to the Canal Zone and placed under such surveillance as was necessary to prevent their departure from the limits of the Canal Zone.

The matter came on for argument before the court on the 5th day of November, 1912. The argument on behalf of the applicants was in the nature of a demurrer to the return. For the purposes of such demurrer the applicants admitted the truth of the allegations contained in the return but requested that if the court should not sustain their demurrer they be allowed to traverse the allegations of the return to the effect that the applicants had engaged in revolution or had consented to come to the Canal Zone and remain within its limits.

In the court's view of the law applicable to the matter it is of no importance whether or not as a matter of fact the applicants

actually surrendered to the forces of the United States or consented to come to the Zone.

Counsel for the respondent on the other hand seemed partly to base his argument in support of the lawfulness of the restraint imposed upon the applicants on the theory that because the President of the United States has exercised and can exercise all the powers of government upon the Canal Zone including legislative and administrative functions, the creation of a system of courts and the appointment and removal of judges of such courts, that therefore the action of the Executive in ordering the restraint of the applicants may, in so far as these applicants are concerned, be taken as a suspension of the right of habeas corpus.

It is true that the political situation in the Canal Zone is unique. It is also true that by virtue of the necessities of the case, the President as the Chief Executive of the United States is invested with all the powers of necessary government over the Zone and its inhabitants. But the President has exercised these powers by the establishment of orderly government through persons delegated and authorized to that end, has promulgated a system of laws to control the conduct and define the rights of the inhabitants and has instituted courts and appointed judges clothed with full power and authority to administer equal justice unfettered by any limitations except their own judicial consciences and a due regard for a proper interpretation and application of the law. It is inconceivable therefore that the right of action of the President in respect of the privileges and immunities of the actual inhabitants of the Zone, is not in general limited by the laws he himself has promulgated and by the rights and guarantees he himself has solemnly proclaimed until such time as Congress shall otherwise enact or until the President himself by express order or proclamation shall amend, abolish, or revoke such laws and guarantees. The court therefore can not hold that the Chief Executive of the United States will or does or can revoke or suspend by indirection any law or order which he has expressly enacted. If, therefore, the restraint exercised over the applicants is to be upheld on some theory other than the one referred to,

It has been held by this court that the Constitution of the United States does not of its own force carry its rights, privileges, and limitations into the Canal Zone (*Canal Zone vs. Coulson*). The President's right of action on the Zone therefore is not limited by constitutional limitations. He is undoubtedly invested with larger right, authority, and power here than in any other territory

controlled by the United States. He has absolute authority in the absence of Congressional legislation to legislate for the Zone. But he exercises such authority not independently of his duty as President of the United States but in connection with his other functions as President of the United States. It is not to be considered, therefore, that it can have been the intention of the Chief Executive of the United States to so legislate for the Canal Zone in which his power of legislation is supreme, as to divest himself of the authority and responsibility peculiarly pertaining to his office as President of the whole United States. Nor can it be considered that the courts of the Canal Zone should so interpret or administer the laws of the Canal Zone of which the Executive is the source as to hamper or embarrass the Chief Executive in the exercise of the larger functions and rights with which he is endowed by the Constitution of the United States and the law of nations.

It is a well-established principle that it is not within the province of courts to pass judgment upon the policy of legislative or executive action. When, therefore, discretionary powers are granted by the Constitution or by statute or by the law of nations the manner in which those powers are exercised or the facts or conclusions on which such exercise of power is based are not subject to judicial review. The courts, therefore, concern themselves only with the existence and extent of these discretionary powers. In *Marbury vs. Madison* (1 Cr. 137; 2 L. Ed. 60) Chief Justice Marshall said:

By the Constitution of the United States the President is invested with certain important political powers in the exercise of which he is to use his own discretion and is accountable only to his country in his political character and to his own conscience. To aid him in the performance of those duties he is authorized to appoint certain officers who act by his authority and in conformity with his orders. In such cases their acts are his acts; and whatever opinion may be entertained of the manner in which such executive discretion may be used, still there exists and can exist no power to control that discretion. The subjects are political. They respect the Nation, not individual rights, and being entrusted to the Executive and decision of the Executive is conclusive.

The doctrine enunciated by Chief Justice Marshall has been gradually extended by the Federal courts to meet the necessities of the territorial expansion and material growth of the United States, until at the present time a wide range of administrative and executive acts is held to be political in its nature and not to be inquired into by the courts because within executive discretion. It has followed as a matter of course that because such acts are

within executive discretion and not subject to judicial review the natural consequences of such acts are not justiciable. Among such discretionary acts as these referred to are necessary acts growing out of executive authority to deal with foreign affairs. While the United States Government in respect to domestic matters is a Government of defined, limited powers, in respect of its control of international relations, it is absolute and all-comprehensive. That is to say, to quote Professor Willoughby in his recent work on the Constitution:

The authority of the United States in its dealings with foreign powers includes not only those powers which the Constitution specifically grants it, but all those sovereign powers which sovereign States in general possess with regard to matters of international concern.

Upon this general authority there rests the obligation of the United States to perform all the duties which international law imposes on a sovereign State; and it follows as a necessary corollary that the Government has powers commensurate with its duties. As was said in the *Legal Tender* cases:

That would appear to be the most unreasonable construction of the Constitution which denies to the Government created by it the right to employ freely every means not prohibited, necessary for the fulfilment of its acknowledged duties.

And in respect to the large majority of matters involved in international relations and questions the President as the Chief Executive acts for the sovereign nation. In such cases his acts are political and discretionary and not subject to judicial review. Nor are the consequences of such acts justiciable by American courts or the courts of the Canal Zone. Among such international matters are included the use or the display of force as a means of constraint to insure observance of rights in countries where the course of justice is uncertain or the political conditions are disturbed. This right is unquestioned in international law and has been exercised many times by the President as the Commander-in-Chief of the Army and Navy of the United States. What force or means is necessary to accomplish the constraint referred to is a matter addressed solely to the judgment of the Chief Executive acting through his duly delegated officers. When, therefore, it appears that the Chief Executive as Commander-in-Chief has landed armed forces on foreign soil for a political purpose legally within his executive discretion it is not for the courts to inquire into the means used by such forces or their commanders in furtherance of that purpose.

In the case at bar this court will take judicial notice of such a notorious fact as that there has been a recent insurrection by armed bands in Nicaragua. It must also take judicial notice of the law of nations, and of the Constitution and Government of the United States, of the powers and duties of the President and of the official acts of executive departments. Inasmuch, therefore, as the return shows that the allegations of fact are based upon the official records of the Department of State and that they are the conclusions upon which the Executive acted with reference to the applicants, such facts can not be the subject of inquiry by this court, in a matter which the court views as purely political.

It is further apparent that when the Executive landed armed forces in Nicaragua for the purpose of protecting the American Legation and the interests of the United States, it was within his sovereign authority and duty to employ such other means in his discretion as would promote the restoration of good order and conserve the interests of the United States until such time as good order should be restored. Such right would seem to carry with it the authority to take as a prisoner any person, who, in the Executive's judgment or in the judgment of his agents, was engaged in hostilities with the armed forces of the United States and the further authority, if such person's continued presence in Nicaragua was deemed inimical to the restoration of order, to expatriate such person temporarily with or without such person's consent. It would follow that the Chief Executive, acting in his best discretion, would seem to have the authority to transport such person to any territory strictly under executive control and there place him under such restraint and surveillance as would prevent him from returning to the country from which he had been carried as a prisoner until such time as the President in his best judgment and discretion should deem such return not inimical to the conservation of good order or to the international interests of the United States.

The Canal Zone is territory exclusively under Federal jurisdiction which jurisdiction is not limited by constitutional provisions. In it, as has already been said, until Congress has otherwise enacted, the President himself is endowed with all the powers of government. It can not have been in his contemplation when, as the law maker, he promulgated that the inhabitants of the Canal Zone should have the benefit of the writ of habeas corpus, that he would thereby so limit his constitutional authority as to

deprive himself of his power to perform his sovereign duty in international relations. And in a case like the one at bar which involves questions of international relations and acts of the President which are within his political authority, because involved in international relations, the courts of the Canal Zone can not so apply the writ of habeas corpus as to hamper the President of the United States in whatever action he deems wise in this behalf. The court must therefore hold that it is without jurisdiction to grant the writs.

The applications are therefore denied and the applicants remanded to the surveillance of the Chief of Police.

Denied.

CAMORS & COMPANY *versus* GRIS.

No. 103. Argued January 8, 1913. Decided February 26, 1913.

APPEAL. REVIEW OF FACTS. MOTION FOR NEW TRIAL.

The Supreme Court will not review the evidence taken in the trial court nor retry questions of fact if the appellant has not filed in the court below a motion for a new trial on the ground that the findings of fact were plainly and manifestly against the weight of the evidence.

NEW TRIAL. NEWLY DISCOVERED EVIDENCE.

A motion for a new trial on the ground of newly discovered evidence will not be granted when the affidavit in support thereof fails to disclose the facts showing that such evidence could not have been discovered and produced at the trial with the exercise of reasonable diligence.

PRESCRIPTION. PLEADING.

Prescription, being a special defense, must be specially pleaded.

BILL OF EXCHANGE. CONDITIONAL ACCEPTANCE. PROTEST.

A conditional acceptance of a bill of exchange, after fulfilment of the condition, obviates the necessity of protest.

Appeal from the Circuit Court of the Second Judicial Circuit;
Hon. William H. Jackson, Judge.

The facts appear in the opinion.

Oscar Teran, for appellant. *Hinckley* and *Ganson*, for appellees.

THOS. E. BROWN, J. This cause was tried in the Circuit Court of the Second Judicial Circuit and on the 6th day of August, 1912, judgment was entered against the appellant, the

defendant below, in the sum of \$5,225.18. Thereafter and on the 27th day of August, 1912, the defendant filed his motion in writing praying that the judgment be vacated and a new trial granted on the sole ground of alleged newly discovered evidence. As a part of the moving papers the defendant filed his own affidavit and that of his attorney which affidavits among other allegations alleged the discovery of certain documents and set forth statements as to what said documents would prove. The motion for a new trial was denied by the court below and the defendant thereafter perfected his bill of exceptions and filed the same in this court.

In the argument before this court appellant's counsel endeavored to discuss questions of fact as well as questions of law. The record shows, however, that the appellant did not file in the Circuit Court a motion for a new trial on the ground that the findings of fact were plainly and manifestly against the weight of the evidence. In such case the Supreme Court may not review the evidence taken in the court below or retry questions of fact. (Code of Civil Procedure, sec. 534.) The only questions before the court therefore, are:

(1) Whether the trial court abused its discretion in denying the motion for a new trial on the ground of alleged newly discovered evidence;

(2) The questions of law raised by defendant's exceptions as set forth in his bill of exceptions.

We shall consider these questions in the order stated.

(1) In discussing appellant's exception to the denial by the trial court of the motion for a new trial, it is not necessary to consider either the facts shown by the evidence taken at the trial or the nature and content of the alleged newly discovered evidence as set forth in the moving papers. The affidavits on which the motion was based fail on their face to disclose one at least of the prerequisites to the granting of such a motion, for they do not set forth any *facts* from which the court could have concluded reasonably that the so-called newly discovered evidence "could not with reasonable diligence have been discovered and produced at the trial." (Code of Civil Procedure, sec. 138, subdiv. 2.) They contain only a bare allegation *ipsissimis verbis*, of that import. Such an allegation is merely a statement of a conclusion and unless facts be alleged which substantiate it, is insufficient. It appears, on the contrary, that the summons in this action was

served nearly two years before the trial was had, that there was ample opportunity, therefore, to discover necessary documents which were in the possession of the defendant, that the alleged newly discovered evidence consisted of documents in the possession of the defendant himself and that he was able to produce the evidence within 21 days after judgment was entered against him. Such conditions give rise to a strong presumption that the defendant was simply negligent in his preparation for trial and the possession of the documents by the defendant imputes to him such knowledge that it must be deemed to refute the mere allegation that he could not have produced the evidence at the trial by the exercise of reasonable diligence. It follows, therefore, that the motion papers were fundamentally defective and that the trial court in denying the motion did not abuse its judicial discretion.

(2) The record shows that this action was brought to recover a balance alleged to be due on a bill of exchange drawn by the plaintiffs on the defendant, the consideration for which bill of exchange was the sale and delivery to the defendant of a shipment of lumber. The said bill of exchange was in words and figures, as follows:

J. B. Camors & Co. \$4,618.45, New Orleans, May 22, 1906. Thirty (30) days after sight of this first of exchange (Second unpaid), pay to the order of W. Andrews & Co., four thousand six hundred and eighteen and 45/100 dollars.

Value received and charge the same to account of, with exchange.

3393 To Jean Gris,

J. B. Camors & Co.

Colon, Rep. of Panama.

The following indorsement appears on the back of the bill:

June 14, 1906, accepted payable July 4, 1906, subject to arrival of lumber before the 4th day of July, 1906.

(Signed) Jean Gris.

The complaint sets out the bill of exchange and the foregoing indorsement and alleges that the lumber referred to in such indorsement did arrive before July 4, 1906. The complaint further avers that on July 31, 1906, the sum of \$800 was paid by defendant on account of the amount due on the bill of exchange and that such payment was indorsed thereon; that thereafter Andrews & Company, the payees named in said bill, indorsed the same without consideration to one Oscar Garic for collection and the bill, a copy of which is in the record, bears on its back the indorsement of Garic to the plaintiffs who were the drawers of the said bill.

The defendant by his answer admitted the conditional acceptance of the bill of exchange, but denied that the lumber referred to therein was received before July 4, 1906, and he further denied that the plaintiffs are the legal holders of the bill of exchange and that the amount alleged in the complaint is due and payable. The answer does not deny that the sum of \$800 was paid on account subsequent to July 4, 1906, as alleged in the complaint and that allegation of the complaint must therefore be considered admitted.

At the trial, upon the close of the plaintiff's case, the defendant by his counsel moved to dismiss on the three following grounds:

1. Because the plaintiffs have not been shown to be the legal holders of the bill of exchange, the transfer by the indorsement of Andrews & Company to Oscar Garic and by Oscar Garic to J. B. Camors & Company, not being valid as operating a transfer.

2. The bill of exchange on which plaintiffs rely, is not enforceable for want of legal protest.

3. The right of plaintiffs to sue defendant on their bill of exchange has expired.

The motion to dismiss was denied by the trial court and defendant noted his exceptions.

As to the third ground stated in the motion to dismiss, it may be said that no statute of limitation was pleaded in the answer and the statute of limitations being a special defense must be specially pleaded in order to be of avail as a defense. The only matters of law therefore discussed in the brief and argument of counsel for the appellant, which remain for this court to dispose of, are the questions raised in paragraphs numbered 1 and 2 in defendants' motion to dismiss.

As we have already stated the appellant having failed to file in the court below a motion for a new trial on the ground that the judgment was manifestly against the weight of the evidence, this court may not review the evidence or retry questions of fact. In considering the questions of law raised by the motion to dismiss, therefore, the court must assume that the court below resolved all material and necessary issues of fact in favor of the plaintiff and that the trial court's findings in this behalf are sustained by the weight of the evidence. It must be presumed, therefore, that the facts show that Andrews & Company were merely the agents of the plaintiffs and appellees, that said appellees who drew the bill of exchange were the real owners of the proceeds of it and that Garic was an agent for collection only. In such case no subtlety of argument can

make the plaintiffs and appellees anything other than the real parties in interest in any litigation arising on the bill of exchange. Nor do the provisions of the Commercial Code (secs. 781, 782, 783) as cited by appellant's counsel have any proper bearing on the questions under discussion. These sections, it is true, provide that indorsements for transfer of commercial paper must be made before the maturity of such paper and that transfer after maturity must be made by separate documents, but these sections refer to the transfer of commercial paper in the ordinary course of business for value received.

They are not applicable to a bill of exchange which returns to the possession of the drawer through a series of indorsements made for collection only when the drawer is and always has been the real party in interest as to the proceeds of the bill. To hold otherwise would be to effect an undue interference on the part of the courts with the orderly and customary processes of commerce.

The appellant insists, however, that the bill of exchange is not enforceable because the same was not protested. This view appellant predicates on the theory that the acceptance was conditional and that the condition was not fulfilled; that there was therefore no acceptance and where there is no acceptance a bill of exchange can not be enforced against the drawer without due notice of protest. The theory is not tenable, however, when considered in the light of the facts. There is evidence in the record that the condition was fulfilled before the maturity of the draft by the delivery of the lumber referred to in the conditional acceptance, and the trial court must have so found. Before maturity, therefore, the conditional acceptance was merged in an absolute acceptance and the acceptance was as absolute and complete as if no condition had ever been made. Protest against the drawee, therefore, was unnecessary to preserve the rights of the drawers, the plaintiffs in the action.

In view of the foregoing it is not necessary to consider what effect, if any, the payment on account by defendant of the sum of \$800 after the maturity of the draft had upon the questions at issue between the parties.

The judgment of the lower court must be affirmed with costs.

Affirmed.

MCKENZIE *versus* THE MCCLINTIC-MARSHALL CONSTRUCTION COMPANY.

No. 104. Argued February 5, 1913. Decided February 28, 1913.

DAMAGES. INADEQUATE JUDGMENT INCREASED ON APPEAL.
In an action for damages, if the judgment of the trial court is inadequate, the same may be increased on appeal. Held that \$500 is an inadequate compensation for the loss of an eye.

Appeal from the Circuit Court of the First Judicial Circuit;
Hon. H. A. Gudger, Judge.

The facts appear in the opinion.

Hinckley and Ganson and V. Bruno, for appellant. *Oscar Teran*, for appellee.

WM. K. JACKSON, J. The plaintiff-appellant recovered a judgment of \$500 against the defendant-appellee in the Circuit Court of the First Judicial Circuit on September 25, 1912. The action was one for the recovery of damages on account of personal injuries received by the plaintiff arising out of the alleged negligence of the defendant on the 11th day of May, 1912. The plaintiff suffered the loss of an eye, and the question here presented is as to the adequacy of the judgment of \$500 for such loss. There is also presented the question as to whether this court has the power to increase the amount of the judgment so rendered by the lower court, and, if not, whether this court should award a new trial to the plaintiff on the ground of the inadequacy of the damages.

While the complaint alleges negligence on the part of the defendant the answer was only a denial of the allegations of negligence, and an allegation of contributory negligence on the part of the plaintiff. There was no defense of "fellow servant" raised by the pleadings in the case or presented for the determination of the trial court. Although the defendant filed its motion for a new trial in the court below the same was subsequently withdrawn, and there is no appeal to this court on behalf of the defendant below. Therefore, it must be considered that the finding of the court below in favor of the plaintiff has established conclusively, so far as this court is concerned, negligence on behalf of the defendant and absence of contributory negligence on the part of

the plaintiff, in fact the right of the plaintiff to a recovery from which there is no appeal here on behalf of the defendant.

The complaint did not allege any permanent diminution of earning capacity by the plaintiff as a result of the injury, nor was there any evidence offered to establish such a claim. The evidence does not show any expenses incurred by the plaintiff as a result of the injuries inasmuch as it would appear that he was treated gratuitously for the loss of his eye at the Ancon Hospital. It would seem from the evidence that he was confined at the hospital for a period of about 35 days, and that thereafter he was offered lighter and easier employment by his former employer, the McClintic-Marshall Construction Company, defendant below. We are, therefore, asked to say whether, in our judgment, the mere fact of the loss of an eye by reason of the established negligence of the defendant, there being no contributory negligence on the part of the plaintiff, and no specific diminution of earning capacity alleged in the complaint or proved at the trial, should entitle the plaintiff to a recovery of a larger sum than \$500. In other words, whether the allowance of \$500 under the circumstances is wholly inadequate. We understand the best rules of pleading as recognized in New York State and elsewhere to be that diminution of earning capacity in order to be considered as an element of damages must be specifically pleaded unless the mere nature of the injury is such that it would naturally and reasonably raise a presumption of diminution of earning capacity as a result thereof. In fact the reason for specific pleading as to the nature and extent of damages is for the benefit of a defendant to enable him to know what claims for damages he is compelled to meet. But the loss of a member of the human body would naturally raise a presumption of a diminution of earning capacity as a result thereof, so much so that no specific allegation thereof would seem to be necessary in the pleading in order to predicate a claim for recovery thereon. This is the result of human experience to such an extent that no specific allegation nor specific proof thereof need be alleged or made. The loss of an eye is such that a court or jury in assessing damages may be entitled to consider diminution of earning capacity as a result thereof, and in so doing may reasonably consider the party's age, habits, condition in life, and present earning capacity. Moreover, it must be said that the plaintiff was undoubtedly entitled to recover for pain and suffering; and the loss of an eye under the circumstances detailed in the evidence at the trial below must certainly have caused the most excruciat-

ing pain and suffering, mental and physical. Under all circumstances we are compelled to say that we do consider the sum of \$500 to be wholly inadequate, especially when we consider the youth of the plaintiff, who was but 24 or 25 years of age, and who must go through life permanently disfigured and with every reasonable human presumption of a permanent diminution of earning capacity.

As to the second question involved, it would seem that this court clearly has the right to increase the amount of the judgment. Section 533 of the Code of Civil Procedure of the Canal Zone reads as follows:

The Supreme Court may, in the exercise of its appellate jurisdiction, affirm, reverse, or modify any final judgment, order, or decree of a Circuit Court, regularly entered in the Supreme Court by bill of exceptions, appeals, or writ of error, and may direct the proper judgment, order, or decree to be entered, or direct a new trial, or further proceedings to be had, and if a new trial shall be granted, the court shall pass upon and determine all the questions of law involved in the case presented by such bill of exceptions and necessary for the final determination of the action.

This would seem to settle the matter beyond peradventure. But if the authorities were wanting we have but to turn to the decisions of the Supreme Court of Louisiana. We find in numerous cases the Supreme Court of Louisiana has increased a judgment for damages in personal injury cases, and that it has repeatedly recognized its right so to do. This has been done in the following cases: *Sullivan vs. Railway Company*, 39 La. Ann. 800, l. c., 803; *Hanna vs. New Orleans Railway and Light Company*, 126 La., 634, l. c., 638; *Dougherty vs. New Orleans Railway and Light Company*, 127 La., 226, l. c., 229; *Decoux vs. Lieux*, 33 La. Ann., 392, l. c., 398.

In the case of *Caldwell vs. Vicksburg, etc. Railway Company*, 41 La. Ann. 624, l. c. 627, the court said as follows:

We rarely find occasion to increase the verdict of a jury in this class of cases; yet, as we recently said:

"With all our indisposition to increase verdicts for damages rendered by juries, who rarely underestimate them, yet it is a matter within our jurisdiction on which we are bound to pass, and we must do justice when clearly satisfied that the jury has failed to do it." *Sullivan vs. R. R. Co.*, 39 Ann., 803 (2 South, 586, 4 Am. St. Rep. 239). Citing numerous other cases.

We can not avoid the conclusion that the present verdict does not do justice. Considering the expenses and trouble incurred by the plaintiff for medical attendance and in the necessary prosecution of his legal right, the sum allowed would leave him no compensation for his suffering and injury at all

commensurate with their serious character. We think we exercise all due caution and give full weight to every consideration in favor of the defendant, in increasing the verdict to \$2,000.

It is, therefore, adjudged and decreed that the judgment appealed from be amended by increasing the amount thereof from \$1,000 to \$2,000, and that as thus amended the same be affirmed, defendant to pay costs of appeal.

Judgment amended by increasing amount from \$1,000 to \$2,000.

We think this rule is one particularly susceptible to adaptation in the Canal Zone where trials of damage cases are without juries, and it is the judges and not juries who must after all assess the quantum of damages. Looking at all the facts and circumstances of the case we may say that we think we exercise all due caution, and give full weight to every consideration in favor of the defendant, as well as to the plaintiff, in increasing the judgment of the court below to \$1,200.

It is, therefore, ordered, adjudged, and decreed that the judgment appealed from be amended by increasing the amount thereof from \$500 to \$1,200, and that as thus amended the same be affirmed, and that the judgment in the court below be corrected and amended accordingly, the defendant to pay all costs in both courts.

Judgment modified.

CANAL ZONE *versus* GIBBS.

No. 105. Submitted March 10, 1913. Decided March 17, 1913.

RETURNING TO CANAL ZONE AFTER SERVING SENTENCE AND DEPORTATION.

One who temporarily returns to the Canal Zone after having been convicted and having served a sentence in prison, and after deportation therefrom, is not guilty of violating the provisions of the Executive Order of the President of the United States, under date of May 2, 1911. A strict and literal interpretation of the provisions of this Order would in many cases work hardship and injustice. The court may consider the intent of the accused in such a case.

Appeal from the Circuit Court of the Third Judicial Circuit;
Hon. Thomas E. Brown, Jr., Judge.

The facts appear in the opinion.

*W. C. Todd, W. H. Carrington, and V. G. De Suze, for appellant.
Charles R. Williams, for appellee.*

WM. H. JACKSON, J. The defendant was tried in the Circuit Court of the Third Judicial Circuit on December 12, 1912, upon an information which charged that "Thomas Gibbs on the 15th day of November, A. D. 1912, in the circuit aforesaid, did then and there wilfully, unlawfully, and feloniously return to the Canal Zone—in that the said Thomas Gibbs had theretofore, on the 16th day of June, 1910, been convicted of the offense of grand larceny in the Circuit Court for the Third Judicial Circuit of the Canal Zone, and had been by said court on the 16th day of June, 1910, sentenced to serve 2 years' imprisonment in the penitentiary of the Canal Zone for said offense, and had thereafter, on the 15th day of April, 1912, after the service of such imprisonment, been deported from the Canal Zone." He was found guilty as charged in the information, and sentenced to a term of 1 year in the penitentiary. The defendant moved to set aside the verdict and to grant a new trial on the ground that the verdict was contrary to the law and the evidence and manifestly against the weight of the evidence. To the overruling of this motion the defendant duly excepted, and prayed the court to certify the facts proved on the trial, which facts so certified are as follows:

The defendant, Thomas Gibbs, is a Panamanian, and lived at Colon long prior to the American occupation of the Canal Zone. That prior to the 15th day of April, 1912, he was convicted of the offense of grand larceny, it appearing that such larceny consisted in stealing from passengers in a coach which such defendant was driving, and served a term of imprisonment in the Canal Zone penitentiary at Culebra, whence he was released on or about the 15th day of April, 1912, and deported to his home at Colon, Republic of Panama; the deportation order reading "deported to Panamanian territory", where he engaged himself in the business of coach driving. That he was seen several times in Cristobal, Canal Zone, transporting passengers from Colon to Cristobal and from Cristobal to Colon. That he never resided in the Canal Zone, nor is he a citizen thereof, and was only seen therein in his capacity as a coach driver. That on the 15th of November, 1912, he was seen at the Cristobal Commissary with a passenger, and on being approached and told that he was under arrest, ran over to Colon. That on the 29th day of November, 1912, he was rearrested in Colon, Republic of Panama, brought to the Canal Zone, and charged with the offense as stated in the information, and for which he was convicted and sentenced to 1 year in the penitentiary at Culebra.

The case is here on appeal from the judgment and sentence of the court below, and the question presented is, whether the facts as certified by the court constitute a violation of the provisions of the Executive Order of May 2, 1911. Said Executive Order is as follows:

Article 1. If any person after having been convicted and having served a sentence of imprisonment in the Canal Zone, and after being deported there-

from returns to the Canal Zone, he shall be deemed guilty of a felony and punished by imprisonment in the penitentiary for 1 year, and thereafter removed from the Canal Zone in accordance with the laws and orders relating to deportation.

Art. 2. This order shall take effect from and after this date.

WM. H. TAFT.

THE WHITE HOUSE, *May 2, 1911.*

The question presented is whether a person, after having been convicted and after having served a term of imprisonment in the Canal Zone and after being deported therefrom, is, in legal indentment, guilty of violating the Executive Order in question by returning temporarily to the Canal Zone in the capacity of a coach driver, for the sole purpose of conveying passengers from Colon, Republic of Panama, to Cristobal, in the Canal Zone, he having no intention of taking up a residence or embarking generally or permanently in business in the Canal Zone.

We have no decisions bearing directly upon this point. In the case of the Government of the Canal Zone *vs.* Joseph Burroughs, which was decided by this court on April 20, 1912, it was, however, held that a person who had been convicted and had served a sentence of imprisonment in the Canal Zone and who was deported therefrom prior to the Executive Order of May 2, 1911, was not guilty of the offense provided in said Executive Order for returning to the Canal Zone after his deportation. But this case can not be said to be analagous to the case at bar. However, it may be said that this court, in deciding the Burroughs case, was mindful of the fact that a strict and literal interpretation of the provisions of the Executive Order of May 2, 1911, would in many cases work hardship and injustice. We think that in the construction and application of the provisions of this Executive Order, we should be guided to a great extent by the "rule of reason." To apply the provisions of said Executive Order to every person deported from the Canal Zone to the Republic of Panama and who might thereafter cross the line and enter the Canal Zone for a purely temporary purpose, without any intention of becoming domiciled in the Canal Zone, or becoming generally employed therein, would not, we think, be in accordance with the object and purposes of said Executive Order, and in fact would be contrary to its true spirit. A strict and literal application of the provisions of this Executive Order would require the imprisonment in the penitentiary for 1 year of the deported person, if he came to Ancon or Cristobal for the purpose of getting his mail from the post office, or if he went to the hospital in either of these places

to visit a sick relative, or if he was compelled to go to the hospital in either of such places for the purpose of medical treatment for himself. We do not think the law contemplated such transitory and unintentional violations; and applying this construction or rule of reason to the admitted facts of the present case, we find that the judgment of the court below was contrary to law.

It follows, therefore, that the judgment and sentence of the court below must be reversed and the case remanded for further proceedings in accordance with this opinion.

Reversed and remanded.

DENIS *versus* RUFO *et al.*

No. 106. Submitted April 23, 1913. Decided May 31, 1913.

PRESCRIPTION.

An heir in the possession of realty which has not been partitioned among the heirs can acquire no title by prescription as against the coheir.

Appeal from the Circuit Court of the Second Judicial Circuit;
Hon. William H Jackson, Judge.

Submitted on an agreed statement of facts.

Narciso Barsallo and *E. M. Robinson*, for appellants. *Oscar Teran*, for appellee.

H. A. GUDGER, C. J. In this case the attorneys, by agreement, furnished a statement of facts, and this consists in the genealogy of the families represented and the conclusions given in the written opinion of the Circuit Judge who tried the case.

It appears that the first and main question relied on by the plaintiff was that she had been in possession of the premises in question for a sufficient length of time to perfect the title in herself as against all others. There is nothing in the record, however, that shows any possession on her part. In the opinion of the presiding judge, which is filed as a part of the case agreed, the statement is made as follows:

The plaintiff's second contention is that she is entitled to ownership and possession by reason of adverse possession, having held the same for over 27 years, without being interrupted or molested by anyone.

The opinion continues:

Saturnino Denis was originally placed in possession of the property in January, 1852, on behalf of himself and his brother and sister, Bernardino and Pilar

Denis. It also appears that, upon the death of Saturnino Denis, in September, 1854, his brother and sister, Bernardino and Pilar Denis, succeeded him and remained in possession until the death of Bernardino Denis in 1882, and that he was succeeded in the undivided possession of Calla Boca by his sister, Pilar Denis, who survived him and who remained in possession until September, 1886. It would also appear, from the defendant's exhibit, No. 2, on page 5 thereof, that the plaintiff and her brother Saturnino Denis, Jr., claimed only a part of the land of Calle Boca, and that Saturnino Denis, Jr., until the time of his death, managed the estate on behalf of all heirs therein concerned.

Accepting, as the presiding judge did, this statement to be true, he ruled that there was no possession on the part of those claiming the same adverse to the heirs. It is impossible to see any error in this holding.

Touching the first point of possession we quote with approval the finding of the presiding judge as follows:

I do not understand that one can obtain title by possession unless said possession has been open, notorious, and continuous and under a claim adverse to all other interests. It is not to be presumed that one in possession of lands, by inheritance is there claiming title adversely to the interests of other heirs having an equal interest therein, whilst the estate remains undivided. It must rather be presumed that one heir to an undivided interest in real estate remains in possession for the use and benefit of all other heirs.

In the judge's finding we have also the following:

The plaintiff herein claims as follows: "Although Maria del Rosario Bares, wife of Saturnino Denis, survived her husband, she lost all her rights as such by reason of her second marriage to Mr. Whitehorne, which took from her even the name of Denis."

The judge ruled that there was no authority in law for this position. It would be a singular fact if a wife, because of her second marriage, lost her right to the estate simply because by the act of marriage her name was changed, she being in direct lineal descent from the ancestor leaving the estate.

There appears to be no error in the record, and the judgment of the court below is affirmed and the case remanded.

Affirmed.

SALAS *versus* ANDREADES.

No. 107. Argued May 14, 1913. Decided September 15, 1913.

WEIGHT OF EVIDENCE.

It is not the province of the Supreme Court to reverse a case on the facts unless the findings of the trial court were clearly at variance with the evidence.

Appeal from the Circuit Court of the Second Judicial Circuit;
Hon. William H. Jackson, Judge.

The facts appear in the opinion.

Francisco Rodriguez C., for appellant. *Oscar Teran*, for appellee.

H. A. GUDGER, C. J. Application was made for an injunction, restraining the defendant from selling or otherwise disposing of 2,000 gallons of rum mortgaged to the plaintiff for the purpose of securing the sum of 10,000 balboas. A plea of payment and counter claim was duly entered, and trial had in the Second Judicial Circuit, and from the judgment the plaintiff appealed to this court.

It appeared at the trial that the mortgage No. 305 was given to secure the 10,000 balboas above referred to, and also as an additional security for certain other indebtedness therein named, due to the brother of the plaintiff, and for which it seems that mortgages had been executed. In this deed, No. 305, houses located in Colon and owned by the defendant, as well as two houses owned by him in Gorgona, and a certain liquor establishment, were all pledged for these sums, with the stipulation that the rents and profits should be collected and paid through the plaintiff to the parties in accordance with their interest, and the balance paid upon the mortgage herein named.

The principal assignments of error were:

1st. As to whether or not Emilio Vivo, the principal collector of rents, was the agent of the plaintiff.

2d. Whether the plaintiff was responsible as such for the collection of the rent that should have been obtained from the property placed in his hands through Vivo as collector.

3d. As to the alleged ruling of the court on the rental value of the property.

The mortgage recites: "I agree to constitute and do hereby constitute as principal administrator of all my landed properties

existing in this city (Colon) and in that of Gorgona and which shall be after specified, my creditor Mr. Haim Salas." There was then an additional proviso that the present collectors were to be retained, "but under the supreme supervision of the administrator and controller, Mr. Haim Salas, to whom they shall deliver as soon as collected the full amount of said rents." It was further stipulated that "if the latter (the collectors) should not proceed at his full satisfaction he shall have the right to change and substitute same after giving due notice to Mr. Antonio Andreades."

The question naturally occurs as to the power conferred by the above. It can not be denied that the plaintiff was placed in absolute charge of the property. He had supreme authority and control over the collectors, and the right, in case he was dissatisfied with their conduct, to discharge and to substitute them at pleasure. He was obliged only to give notice of his action and nothing more. It was his duty, under the terms of the mortgage, to make a monthly statement. Being in charge of the property it was likewise his duty to see to it that the rents were collected and applied as set forth in the mortgage; and, if Vivo did not discharge his duty, he should have exercised the authority conferred by the mortgage to substitute some one else in his place. In other words, Vivo was his agent, and as such he, Salas, was responsible for his conduct—that is to say, he was obliged to see to it that he exercised the functions of a collector with due diligence.

At the trial evidence was taken without objection as to the rent the houses produced each month. By noting the last question on page 36 of the evidence it will be seen that the question, "Have you the total there" (meaning the total amount the houses produced) was asked the witness. There was no objection to his answer, and his answer was, "Yes, \$3.598 a month." It will be noted also that on page 38, next to the last question on direct examination another witness was asked as to the value that the houses would produce. No objection was made, and the answer was, "\$3,500." It will be noted furthermore that in the examination of this witness, on page 39, the plaintiff asked in the second question on the page, "Do you know the average rental value of rooms there." This was objected to by the defendant. The objection was overruled by the court, and the answer was, "Yes, sir, before a few years ago rents were very much higher on account of a scarcity of houses, but since that time the rents have come down; at that time rooms were rented at \$16, \$18, and \$20 and cantines up to \$25. The record, therefore, not only shows that no ob-

jections were made to this evidence, but it shows furthermore that the plaintiff himself pursued the subject and seemed to regard it as material.

There does not appear to have been, as the mortgage evidently contemplated, an intelligent accounting made by the plaintiff. The evidence of payments is most complicated. Both plaintiff and defendant, as well as their witnesses, give different accounts of different sums and different amounts with yielding values.

In this conflict of testimony, not confined to the parties themselves, but also to the witnesses, it was difficult for the court to ascertain the true facts. The record shows that the court in giving judgment took into consideration the evidence showing what the houses were capable of producing each month, not as an absolute guide, but simply as throwing light on the subject. This light should have been thrown on by an intelligent accounting by the plaintiff himself. The questions in the main, however, before the court were questions of fact and not of law, and the conclusion arrived at seems to be fully sustained by the testimony. It has been a rule of this court that when the testimony sustains the finding and only a question of fact is involved, not to disturb the judgment.

The judgment of the court below is affirmed. Let this be certified.

Affirmed.

CANAL ZONE *versus* ANDERSON and ADDISON.

No. 108. Argued February 19, 1913. Decided March 27, 1913.

EVIDENCE. ADMISSIBILITY.

Oral testimony as to the evidence of a witness given at a previous hearing can only be admitted in a criminal case, provided it has first been made to affirmatively appear that the witness is dead, or, if living, that the government has used diligence in endeavoring to procure the absent witness; that the witness is beyond the jurisdiction of the court and that the defendant is in some way responsible for his absence.

Appeal from the Circuit Court of the First Judicial Circuit;
Hon. H. A. Gudger, Judge.

The facts appear in the opinion.

V. E. Bruno, for appellant. *Charles R. Williams*, for appellee.

JACKSON, J. The defendant, Sydney Anderson, together with Michael Richards and John Dettering, were tried in the District Court on a charge of petit larceny, and were found guilty and sentenced to pay a fine of \$25 and to a jail sentence of 30 days. John Dettering was arraigned in the District Court on a charge of embezzlement of goods of the value of \$6.17, and waived trial in that court. The defendants, Addison and Dettering, were tried in the District Court on a charge of attempt of embezzlement, and were both found guilty and sentenced to pay a fine of \$12.50, and to a jail sentence of 30 days. The cases were all appealed to the Circuit Court, and thereupon the assistant prosecuting attorney filed an information against John Dettering, Sydney Anderson, Michael Richards, and William Addison, charging that the defendants did then and there unlawfully combine and agree and conspire and act together for the purpose of stealing valuable goods and merchandise from the Panama Railroad Company. This case came on for trial in the Circuit Court of the First Judicial Circuit at Ancon on the 18th day of December, 1912, at which time, by agreement of counsel, the trial of these four cases, that is, the three cases coming up from the District Court, together with the conspiracy case brought originally by information in the Circuit Court, were consolidated. Dettering and Richards did not appear for trial, and the consolidated cases proceeded against Sydney Anderson and William Addison, the defendants herein.

At the trial of these cases in the District Court, on the charges of petit larceny and attempt of embezzlement, one Samuel Barrett appeared and testified on behalf of the Government. The Government was not able to produce the said Barrett as a witness at the trial in the Circuit Court, and the record in this respect discloses the following:

It is admitted by counsel that the witness, Samuel Barrett, is absent from the Canal Zone. The court thereupon permits the testimony of said witness in the lower court to be proved by another witness. Defendants except.
* * * After hearing testimony for the defense and the arguments of counsel, the court finds the said defendants, Sydney Anderson, Michael Richards, and William Addison, guilty of conspiracy.

The court, however, returned verdicts of not guilty in causes Nos. 702 and 705, that is, in the cases appealed from the District Court on the charges of petit larceny and attempt of embezzlement.

It will be noted that there was no trial or preliminary hearing in the District Court upon any charge of conspiracy, and Barrett's testimony in the District Court was solely as to the charges in the cases pending in that court, namely, petit larceny and attempt of embezzlement, wherein verdicts of not guilty were rendered on appeal in the Circuit Court.

Police officer, James Graham, was permitted in the Circuit Court, over the objection and subject to the exception of the defendants, to testify as to the testimony of Samuel Barrett in the District Court, and this testimony was considered by the Circuit Court on the charge of conspiracy, which charge was not before the District Court. And it may be said that it is conceded by counsel that the testimony of officer Graham as to the substance of the testimony of Barrett was important, if not essential, to the conviction of the defendants on the charge of conspiracy. It may also be said that there was some conflict in the Circuit Court between officer James Graham and the manager of the commissary at Balboa as to certain facts and circumstances relating to Barrett's testimony as given in the District Court. This conflict related to the position of Barrett as described by him in the District Court, which would have a bearing upon his ability to see the facts which he had testified to in the District Court.

However, the broad question presented for our determination is as to the admissibility in the Circuit Court of the evidence of officer James Graham attempting to detail the testimony of Barrett given in the District Court. It is doubtful, to say the least, if this testimony could properly have been received in the appeal cases of petit larceny and attempt of embezzlement in which cases Barrett had testified in the District Court. But it seems clear that it was not properly admissible so far as it related to the charge of conspiracy, which was not before the District Court, in which case the defendants were found guilty in the Circuit Court. The fact that the cases were consolidated by agreement of counsel does not, we think, alter this view. Although the facts tending to prove the charges of petit larceny and attempt of embezzlement were facts that might well tend to establish the charge of conspiracy, nevertheless the issue was different, and the gravity of the offense and the punishment for conspiracy were greater than for the other offenses.

All cases having a bearing upon the question recognize the principle that the issue must be the same in order that oral testimony of evidence of a witness given at a previous hearing can be

admitted. And even where the issue is the same, we think it is recognized by the best authorities that before such evidence can be admitted in a criminal case, it must first be made to appear affirmatively either that the witness is dead or, if living, that the Government has used diligence in endeavoring to produce the absent witness and that the witness is beyond the jurisdiction of the court, and also that the defendant is in some way responsible for the absence of such witness. The record in this case discloses only one of these essentials namely, "That the witness Samuel Barrett is absent from the Canal Zone." It fails to show what steps the Government had taken to locate the said Barrett and to procure his attendance, or that the defendants or either of them had induced Barrett to depart from the Canal Zone.

In *Sullivan vs. State*, 6 Tex., App. 319, it is said:

Inasmuch as this species of testimony is admitted as a sort of judicial necessity the proof of the facts which constitute the necessity for the departure from general rules ought to be clearly established, as that the witness is dead, that diligent inquiry has been made for him where it is most likely he would be found or that the defendant had caused his absence; the proof on this subject should be complete and satisfactory.

In *Collins vs. Commonwealth*, 12 Bush. (Ky.), 271, Chief Justice Lindsay said in delivering the opinion of the court:

Whatever may be the rule as to the testimony given by an absent witness on a former trial in a civil action, it can not be proved in a criminal trial. The courts allow proof of such testimony when the witness is dead, but we are not advised that the rule has ever been extended so far as to permit either the Commonwealth or the accused to prove the statements of a witness upon the sole ground that he was absent from the State and beyond the territorial jurisdiction of the court.

And in case of *State vs. Wing*, 66 Ohio, St. Rep., 407, it was decided that prior testimony of a witness not found after diligent search and believed to be without the State, was not admissible in a criminal case unless the absence was due to the accused's connivance.

In the case of *Bergen vs. People*, 17 Ill., 426, it was held:

That even in jurisdictions not applying so strict a limit of excuse for non-production of the witness, the same feeling of the importance and the consequence of error shows itself in requiring strict preliminary proof that the conditions of admissibility prevailing in the particular jurisdiction have been fully complied with.

In fact, it is conceded by counsel for the Government that the rule prevailing in many States, particularly in New York and

in Georgia, would exclude the testimony that was given by officer James Graham at the trial in the Circuit Court.

Government's counsel, however, refers us to many sections of Wigmore on Evidence, volume 2, as sustaining his contention, all of which we have carefully read and considered. But we think the rule so clearly stated and so ably supported by reasoning in Wigmore's excellent work on evidence presupposes the existence of the essential prerequisites that the issue in the former trial must have been the same and that the Government has shown affirmatively that it has used every reasonable means to secure the attendance of the missing witness, and also that the missing witness is beyond the jurisdiction of the court by reason of some connivance on the part of the defendant. As we have herein stated, these essential requisites must be well established in order to make such evidence admissible, and in the present case they were not so established.

It follows therefore that the judgment and sentence of the court below must be reversed and the case remanded to the Circuit Court of the First Judicial Circuit for further proceedings in accordance herewith.

Reversed and remanded.

BLUE *versus* THE PANAMA TIMBER COMPANY.

No. 109. Argued April 30, 1913. Decided May 22, 1913.

WEIGHT OF EVIDENCE.

It is not the province of the Supreme Court to reverse a case on the facts unless the findings of the trial court were clearly at variance with the evidence.

JURISDICTION. EXECUTIVE ORDER, July 28, 1910.

One domiciled in the Canal Zone for the purpose of transacting business in the Republic of Panama is not transiently within the limits of the Canal Zone government within the meaning of the Executive Order above mentioned.

By alien nonresidents, this Executive Order clearly refers to nonresidents who are likewise not citizens of the United States of America.

STATUTE OF FRAUDS.

Article 91 of Law 153 of 1887, has in substance been repealed by section 351 of the Code of Civil Procedure.

MOTION FOR NEW TRIAL. NEWLY DISCOVERED EVIDENCE.

A motion for a new trial on the ground of newly discovered evidence will not be granted when the affidavit in support thereof fails to disclose the facts showing that such evidence could not have been discovered and produced at the trial with the exercise of reasonable diligence.

Appeal from the Circuit Court of the First Judicial Circuit;
Hon. H. A. Gudger, Judge.

The facts appear in the opinion.

Felix E. Porter, for appellant. *Hinckley and Ganson*, for appellee.

WM. H. JACKSON, J. On November 25, 1912, the plaintiff, William A. Blue, recovered a judgment of \$800 against the defendant (appellant) by the consideration of the Circuit Court of the First Judicial Circuit. The plaintiff's action was predicated upon a tentative contract alleged to have been made and entered into in the City of New York on the 15th of May, 1911, between the plaintiff and Mr. C. E. Jackson as the managing superintendent of the defendant company, by the terms of which the plaintiff was to be employed as logging manager of the defendant company at a salary of \$400 a month, and expenses, and the further consideration that the defendant was to pay to the plaintiff at the expiration of 10 months from the date of execution of said contract the sum of \$600, with which the plaintiff was to be allowed a vacation of 6 weeks, it being stated at the time of the making of said contract that the same was based on the Isthmian Canal Commission's contracts relative to the vacation pay of its employees.

There was evidence to show that this tentative contract of May 15, 1911, was altered and a new contract entered into at the Hotel Tivoli between the plaintiff and the defendant acting through its managing agent Mr. C. E. Jackson, by which the plaintiff was to receive \$5,000 per annum for the first year and \$10,000 per annum for the second year; but there is no evidence to show that this latter contract was recognized or carried into effect between the parties.

The plaintiff received monthly the sum of \$400 from the defendant company for his services as logging manager, until July 15, 1912, when his contract of employment was terminated by the company, and his suit here is based upon his claim for \$600 vacation money and his expenses, pursuant to the agreement which the plaintiff alleges to have existed. There is also the further claim for \$200 on account of services actually rendered from the 15th of July to the 1st of August, 1912, but this claim

is not set forth in the complaint, but appears to be supported by evidence adduced at the trial, without objection on the part of the defendant.

On the trial of the case the plaintiff testified in his own behalf in support of his claim for \$600 vacation money and expenses, but there was no evidence at the trial on behalf of the defendant denying the contract as claimed by the plaintiff. It must be said, therefore, that the finding of the court as to this question of fact, and the judgment of \$600 seems abundantly supported by the evidence and the record fails to disclose any ground for reversal on this point.

The defendant, however, entered a plea to the jurisdiction of the court, and relied, in support thereof, upon the provisions of the Executive Order of July 28, 1910, which provides as follows:

By virtue of the authority vested in me, I hereby establish the following order for the Canal Zone Government:

SECTION 1. No civil action or special proceeding shall be brought or proceeded with in the courts of the Canal Zone, in any case in which both of the parties, plaintiff and defendant, are alien nonresidents of the Canal Zone, and the cause of action is one which arose without the territorial limits of the Canal Zone government, and the party proceeded against has no property within said territorial limits, subject to the jurisdiction of the Canal Zone courts.

Neither shall any civil action or special proceeding be brought or proceeded with in the courts of the Canal Zone when both parties, plaintiff and defendant, though citizens of the United States, are found transiently within the limits of the Canal Zone government, unless the cause of action is one arising within the said territorial limits, or the party proceeded against has property within the said limits, subject to the jurisdiction of the Canal Zone courts.

This order shall not be construed to exclude from the jurisdiction of the Canal Zone courts cases between parties who have an official or business residence within the territorial limits of the Canal Zone government, or who reside therein for the purpose of any occupation or employment, notwithstanding that they may not have acquired a permanent residence within said territorial limits.

SEC. 2. All laws, orders, and decrees, or parts thereof, in conflict with this order, are hereby repealed.

There was evidence offered tending to show that neither the plaintiff nor the defendant were residents of the Canal Zone, and that the defendant had no property in the Canal Zone, and it being shown that the original contract was made and entered into in New York City, the defendant therefore claimed that the courts of the Canal Zone were without jurisdiction in the premises. But there was evidence showing conclusively that the plaintiff resided continually for over a year at the Hotel Tivoli as a matter of convenience for carrying on the business of the company in

the Republic of Panama. There was some evidence to show that the final terms of the contract, both contracts being oral, were consummated at the Hotel Tivoli, but as this latter contract seems never to have been recognized or acted upon, weight can not be given to that claim. But on the question of jurisdiction there was further evidence to show that the defendant company did actually have property in the Canal Zone, particularly at Balboa, during the time that the plaintiff was employed as its logging manager.

The question of jurisdiction was presented to the trial court upon these disputed facts, and the trial court overruled the defendant's plea of lack of jurisdiction, and found the essential jurisdictional facts in favor of the plaintiff. This finding we are not disposed to disturb. It will be noted that the first part of the Executive Order relates to alien nonresidents of the Canal Zone. This evidently refers to nonresidents who are likewise not citizens of the United States. The Executive Order further provides that a civil action shall not "be brought or proceeded with in the courts of the Canal Zone when both parties, plaintiff and defendant, though citizens of the United States, are found transiently within the limits of the Canal Zone government, unless the cause of action is one arising within the said territorial limits, or the party proceeded against has property within the said limits, subject to the jurisdiction of the Canal Zone courts." This evidently relates to tourists or others in the Canal Zone for purposes other than permanent business in the Canal Zone or Panama. If one is domiciled in the Canal Zone for the purpose of transacting his business in the Republic of Panama, we do not consider that he is "transiently within the limits of the Canal Zone government" within the meaning of the Executive Order. But moreover, there was proof tending to show that the defendant had property within the Canal Zone, and the record fails to show any reason for disturbing the finding of the court on these jurisdictional questions of fact.

The defendant further claimed that the agreement between the plaintiff and the defendant, being for more than 500 pesos, the same was unenforceable for the reason that it was not in writing, pursuant to the provisions of article 91, Civil Code of Panama, page 567. This and similar provisions of the Civil Code of Panama have frequently passed under review of this court and the Circuit Courts, and it has been held that oral agreements of co-partnership are enforceable in the Canal Zone, although the same

would appear to be prohibited by the Civil Code of Panama; likewise, that oral agreements that would form the basis for the establishment of resulting trusts have been similarly enforced in the Canal Zone, although apparently prohibited by the Civil Code of Panama. And if, aside from these decisions, a further reason were necessary, it might be said that section 351 of the Code of Civil Procedure of the Canal Zone effectually disposes of the question. This section specifically enumerates the contracts that must be in writing in order to be enforceable in the Canal Zone. Said section 351 embraces the well-known provisions of the Statute of Frauds and no others. Therefore it would follow that in the Canal Zone, other contracts than those specifically set forth in said section 351 may be enforceable although not reduced to writing and signed by the parties or their agents.

At the hearing in this court the appellant filed herein its motion that this court receive and consider newly discovered evidence attached to the affidavit of appellant's attorney. The affidavit states that the newly discovered evidence was not discovered and with due diligence could not have been discovered either before trial of the cause or at the hearing upon the motion for a new trial. But it must be said that this averment of the affidavit amounts only to a conclusion, inasmuch as it does not set forth facts to show what diligence was used to discover the evidence in question. Furthermore, the newly discovered evidence consists of correspondence, all of which was at the time of the trial in the possession of the defendant company in its offices in London. It is difficult therefore to see why it was not available at the trial. This court has held, in the case of *Fitzpatrick vs. The Panama Railroad Company*, that papers in the possession of the defendant at the time of the trial would not be considered as newly discovered evidence because of failure or neglect to produce them at the trial.

Furthermore, a very careful reading of the correspondence in question fails to indicate that its production at the trial would have acquired a different result. The correspondence attached to the affidavit shows a letter to the plaintiff from the general manager of the company, of June 14, 1912, discharging plaintiff from the service of the company; also, a letter of the plaintiff, of September 4, 1912, to a Mr. Horsey, a representative of the company in New York, in which he refers to his contract with Mr. Jackson for vacation allowance and requests that the same be granted him. And there seems to have been no express denial of the existence

of said contract. Furthermore, the affidavits from the London managers of the defendant do not meet the precise point, inasmuch as the plaintiff's claim was that his contract was with Mr. C. E. Jackson, the managing superintendent, and the affidavits in support of the motion for a new trial do not contain any affidavit from Mr. Jackson. On the contrary, a letter from the London office, of December 13, 1912, contains this statement: "It does not appear to us that a statement by Jackson would be material. Any arrangement made by Jackson with the plaintiff was clearly only of a temporary nature."

Therefore, as the plaintiff's claim to an agreement for vacation money and expenses, with Mr. Jackson as the managing superintendent, is nowhere attempted to be denied by Mr. Jackson himself, and as Mr. Jackson's authority to make such agreement is not even denied, it would not seem that the evidence set forth in the appellant's affidavit, even if received at the trial, should have changed the result.

It follows that the judgment of the court below must be affirmed, with all costs against the defendant-appellant.

Affirmed.

TERRY *versus* THE PANAMA RAILROAD COMPANY.

No. 110. Argued March 12, 1913. Decided March 28, 1913.

LICENSEE.

One who is on the property of another, with the mere acquiescence of the latter, but not by invitation, express or implied, is a mere licensee.

Appeal from the Circuit Court of the Third Judicial Circuit; Hon. Thomas E. Brown, Jr., Judge.

The facts appear in the opinion.

Hinckley and *Ganson*, for appellant. *W. K. Jackson*, and *Charles R. Williams*, for appellee.

H. A. GUDGER, C. J. This action was tried in the Third Judicial Circuit, judgment entered, and appeal taken from the same, the facts being substantially as follows:

The Panama Railroad Company operates a rail line across the Isthmus, a part of which is between Gatun and New Gatun stations. On the 15th of August, 1912, the plaintiff, Mrs. Terry,

was walking along a path paralleling the railroad, and on the right of way of the same, and when she was about 250 yards beyond Gatun station, in the direction of New Gatun, and at a sharp curve and cut, a freight train of defendant company, going in the direction of Colon, approached the point where the alleged accident occurred. That when the train was in close proximity to her it ran over two torpedoes which had been placed on the track, and, simultaneously with the explosion, the plaintiff was struck in the face by some unknown material. She was taken to the dispensary for treatment, and subsequent to this injury had severe headaches which had not theretofore existed, and was compelled to use an atomizer for nasal ailment although prior thereto she had not been so compelled.

The damages to plaintiff consisted in being unable to perform her usual domestic duties, she being highly nervous and somewhat hysterical. The husband was joined as a party plaintiff for the reason of having been deprived of the services of his wife, and having had to spend certain money in an attempt to cure her of the injury. The walk way between the two stations was not a public highway, but was used daily by large numbers of people, and was being used at the date of the alleged injury. At the point where the injury was said to have occurred it was customary for the Panama Railroad Company to place torpedoes for the purpose of warning other passing trains in order to protect life and property.

It was argued by the plaintiff that, though there is no direct testimony to that effect, the fact that no warning or notice was issued, forbidding persons to walk on the said right of way, and that it had been used for a year or more by pedestrians, that, therefore, it amounted to an invitation of the public to use it for the purpose of a pass way, and that the defendant was chargeable with any injury caused to anyone passing.

It is true that where a person is invited, either directly or by implication, to visit the property of another, it is the duty of the property holder to see to it that everything is done for his or her protection, and that a failure in this regard renders the property holder liable in damages.

The question, however, in this case is as to whether the plaintiff was there by invitation of the company or as a licensee. If she was there by invitation of the company then the company was under obligation to use more than ordinary care for her protection, but if she was there as a licensee then the company was under obligations

to use due care and diligence in avoiding any damage or injury to her while they knew she was present, but for the ordinary risks they owed her no duty. It seems clear from the proof in the record that the plaintiff was a mere licensee, and the rule seems clearly stated by the citations below given:

The better rule is that the licensee takes his license subject to its concomitant perils and the licensor as a general rule owes him no duty except to refrain from wilfully or wantonly injuring him or to exercise ordinary and reasonable care after discovering him to be in peril. In the language of continental jurisprudence, there is no question of *culpa* between a gratuitous licensee and the licensor as regards the safe condition of the property to which the license applies. Nothing short of *dolus* will make the licensor liable.

It seems to us, therefore, that the only duty which he owes to such persons whether they are trespassers or bare licensees is not to wilfully or wantonly injure them but to use reasonable care to avoid injury to them after their danger is discovered. (Vol. 3, Elliott on Railroads.)

In 33 Cyclopaedia we find the following:

A trespasser or bare licensee on or near a railroad track can not recover for injuries caused by articles projecting, falling, or being thrown from a train unless the railroad company knew of the danger and of the injured party's peril and failed to use ordinary care to avoid the injury.

A licensee walking near a railroad track can not recover for an injury received by a brake shoe which flies from a passing car.

And in the case of *Clardy vs. Southern Railway Company*.

A railroad company is not liable to a licensee, who used the right of way as a footpath, for injuries occasioned by a stone which formed a portion of the company's track and which was casually dislodged from its place therein and hurled against him by a passing train.

In the case of *Little Rock & F. S. R. Co. vs. Pankhurst*, the court decided:

To a bare licensee railroads owe no affirmative duty and care, for such licensees take their licenses with its concomitant perils.

There are numerous decisions along this line, which establish the doctrine beyond any question.

There is no evidence that the defendant company knew that the plaintiff was near the point where the torpedoes exploded. There is affirmative evidence that the torpedoes were placed there in the regular course of business for the purpose of protecting life and preserving property, and that such was necessary. Under these circumstances the railroad company was not, in our opinion, liable for damages.

The judgment of the court below is affirmed.

Affirmed:

WEAVER *versus* VAN ZANT.

No. 111. Argued May 21, 1913. Decided May 27, 1913.

WEIGHT OF EVIDENCE.

It is not the province of the Supreme Court to reverse a case on the facts unless the findings of the trial court were plainly and manifestly against the weight of the evidence.

Appeal from the Circuit Court of the Second Judicial Circuit,
Hon. William H. Jackson, Judge.

The facts appear in the opinion.

C. P. Fairman, for appellant. *Carrington and Todd*, for appellee.

H. A. GUDGER, C. J. In this case it appears from the record that the plaintiff and defendants entered into a contract of lease for certain property in Arizona, said contract being solemnized at Cristobal, C. Z. The terms of the lease were that the plaintiff's wife, as his agent, should go to Arizona and take charge of the farm in question and work the same until such time as her husband could join her. In obedience to this contract and with a full knowledge and assent of defendants, the wife left Colon and arrived at her destination in Arizona some time about the middle of November, 1910. When she arrived she applied to the agent of defendants, and both went to the ranch. At the time the ranch was in possession of one Richardson, who had rented the same for the term of 6 months, and paid the sum of \$75 in advance for the premises. The agreement with Richardson and the agent seems to have been that this contract was subject to the ratification or rejection of the defendants herein, and, further, that Richardson was to surrender the possession of the property at any time requested to do so upon the payment of the pro rata monthly rental to him. Plaintiff's wife remained with the tenant in possession for the term of 10 days. There was no effort on the part of the defendants, or their agent, to cancel the contract with Richardson, and no allegation that it was done or attempted, nor does it appear that his contract was either ratified or rejected by the defendants. After the expiration of the 10 days Mrs. Weaver left for her home in Illinois. It appears in the evidence of Richardson that during her stay there he offered to deliver

her possession of the premises, and stated that he would move out as quickly as he could do so. This the plaintiff denies and says he made to her an offer to vacate the premises and place her in possession if she would refund to him \$75 rent advanced by him.

The lower court found upon this evidence that Mrs. Weaver did not get possession of the property and had no opportunity to acquire the same, save and except on the condition set forth by the tenant Richardson. Upon these facts the court allowed her damages equal to the actual traveling expenses from Colon to Arizona and return, namely, \$596. From this judgment the defendant appealed to this court.

It is unnecessary to enter into a lengthy argument with regard to the law governing such cases. It seems clear that a contract was made, that the same was within the jurisdiction of this court, that it was violated upon the part of the defendants herein, and that Mrs. Weaver was entitled to damages. The record discloses no error; and

It is therefore ordered and decreed that the judgment of the lower court be in all respects affirmed, and that the case be remanded to the circuit court for such orders as may be deemed necessary.

Affirmed.

THULL, Administrator *versus* THE PANAMA RAILROAD COMPANY.

No. 112. Argued May 14, 1913. Decided May 27, 1913.

NEGLIGENCE. LESSOR AND LESSEE. RAILROADS.

The lessor is not liable to the servant of the lessee for injuries received in the line of service required of him in operating a railroad.

Appeal from the Circuit Court of the Second Judicial Circuit; Hon. William H. Jackson, Judge.

The facts appear in the opinion.

Felix E. Porier, for appellant. *Frank Feuille* and *Charles R. Williams*, for appellees.

H. A. GUDGER, C. J. This action was tried in the Second Judicial Circuit, and from the judgment entered an appeal was taken to this court. The record is long and tedious, but the essential facts are sufficiently stated.

The Isthmian Canal Commission, in the due process of construction work, found it convenient and necessary, in order to accommodate and properly care for its workmen, who could not be furnished quarters at Gatun, to operate a special work train along the line of the canal south of Gatun as far as Culebra. For this purpose they used the defendant company's roadbed during certain hours in the morning and afternoon going to and from the place of work, Gatun, and this time was covered by the required train orders from the defendant company.

The Isthmian Canal Commission used its own equipment and furnished its own help in operating this work service. It was not for the purpose of transporting the public generally, but only employees engaged in the work of the canal at Gatun, with the exception that some few who were at work for the Panama Railroad Company on the relocated line were also allowed passage on this train.

When this service was first instituted a subscription was taken up from those who used the train in order to defray the extra expenses of the same, but this having proved unsatisfactory a nominal charge of 5 cents was placed on each employee, and this amount was used in paying the train crew for their extra time. The engine used on this service had no pilot, and, on the day named in the complaint, struck a cow which was on the track of the road, was derailed, and the engineer in charge of the train instantly killed.

It further appears from the record that the defendant's railroad track was not fenced.

The Panama Railroad Company is a corporation doing business in the Canal Zone, and, as such, is liable to be sued in the courts for alleged injuries, even though, as a matter of fact, its stock is owned and the road controlled by the United States Government. So long as the railroad retains its original corporate charter and exercises rights and privileges under the same, it is amenable to the law and subject to the jurisdiction of the courts.

On the contrary, the Isthmian Canal Commission is the agent of the United States Government, and, as such, can not be sued in the courts, except to the extent and in the manner that may be provided by law. There is no provision authorizing a suit directly against the United States Government, but there is a provision which relates to accidents among the Commission employees, and provides that dependent persons on those injured may claim

and receive certain compensation. In the case before us this was claimed and paid.

The defendant owned the track over which the cars passed at the time of the injury, but had no control over the train or crew nor was it in any way operated by employees of that company. They did, however, give permission to the Isthmian Canal Commission to operate this work train on their track.

The question, therefore, to be considered and determined is, does this fact make the Panama Railroad Company liable for the injury referred to? It is not necessary to go into all the questions that relate to lessors and lessees, nor to the question as to how far those not connected with either the lessor or lessee would be affected as compared with the servants of either. The difference between the two has been well settled, the latter having a contractual relation. In Elliott on Railroads, volume 1, section 472, we find the following:

The person who takes service with the lessee company voluntarily accepts that company as his employer, and out of this contract comes the duty which the contracting parties owe to each other. The employee of the lessee certainly owes no duty to the lessor, and it is difficult to conceive a tenable ground for the conclusion that the lessor owes a duty to the employee.

The employer assumes to perform the duties imposed upon it by law in its character of employer, and the employee voluntarily takes the lessee company as his employer. The employee does not contract with the lessee as the agent of the lessor, but contracts directly with the lessee as its own representative and not as the representative of some other person or corporation.

In a note to this text, referring to the *B. and O. R. R. Co. vs. Paul*, 143 Ind., the court, after drawing the distinction between wayfarers and employees, uses the following language:

There is no privity between persons injured in such a case and the operating company. It is not so with an employee who voluntarily enters the service of the latter company with a knowledge of the facts and participates knowingly in the wrong, if wrong it be.

In *Mo. Pac. R. R. Co., vs. Watts*, 63 Tex., we find the following:

It was held that the lessor is not liable to the servant of the lessee for injuries received in the line of service required of him in operating the road.

The same doctrine is held in the case of *Willard vs. Spartanburg, R. R. Co.*, 124 Fed. Rep., together with other cases therein especially referred to.

It will be seen from the above that it is the duty of the employee to look to his immediate employer.

It has been seriously contended that the Panama Railroad Company was obliged to fence its line of railroad across the Isthmus from Colon to Panama, and that having failed in this duty, it is chargeable with any negligence which might have been caused by this failure. So far as we have been able to ascertain there is no law in the Canal Zone requiring that this shall be done. It is true that in many portions of the United States, and especially so in densely populated districts, such duty is enjoined by statute.

It is our opinion that the Panama Railroad Company is not responsible for the negligence, if such there was, of the Isthmian Canal Commission in the accident referred to, nor was it under obligations to fence its line across the Isthmus.

Therefore, the judgment of the court below in finding in favor of the defendant was proper, and its action is affirmed.

Let this be certified.

Affirmed.

AROSEMENA *versus* EISENMANN.

No. 114. Argued July 16, 1913. Decided September 15, 1913.

IMPROVEMENTS. REVINDICATION.

One who improves the land of another in good faith, and with the knowledge and consent of the owner, is entitled to the reasonable value of such improvements prior to being evicted from the premises. The actual value of such improvements at the date of trial should be awarded to the defendant in an action in revindication in such case, and it matters not whether the improvements were placed upon the land by such defendant or by his predecessors in interest.

Appeal from the Circuit Court of the First Judicial Circuit;
Hon. William H. Jackson, Judge.

The facts appear in the opinion.

Oscar Teran, for appellant. *Hinckley* and *Ganson*, for appellee.

THOS. E. BROWN, J. This action was brought to recover possession of a portion of certain premises known as "Club X" situated on the Sabanas near Ancon and also to recover rent for a period of months.

The proof shows that the legal title to such plot is in the plaintiff and it appears that sometime in the year 1907 Mrs. Teodolinda

Boyd de Arosemena with the knowledge and consent of the owner of the premises erected a house and outhouses on the portion of the premises sought to be recovered in this action. Thereafter and on January, 1909, by an instrument in writing, duly executed, Mrs. Boyd de Arosemena sold and conveyed the said house and outhouses to the appellants, defendants in the court below, the purchase price being the sum of \$2,500, Panamanian silver.

In their answer the defendants alleged among other allegations that they had purchased and erected on the property in good faith certain improvements, viz, the buildings aforesaid and fences and had cleared land, planted crops, etc. The answer, therefore, prayed that in the event that title to the land should be adjudged to be in the plaintiff, the plaintiff be required to reimburse the defendants for the cost of such purchase and improvements before being let into possession of the said premises.

After trial duly had in the Circuit Court of the Second Judicial Circuit the trial court found title to the premises to be in the plaintiff and that defendants were indebted to the plaintiff in the sum of \$40, United States currency, for rent accrued since January 1, 1912, at which date the plaintiff notified the defendants that they must pay rent. The trial court further found that since their purchase of the buildings from Mrs. Boyd de Arosemena the defendants had made improvements on the premises at an expenditure of \$3,000, Panamanian silver, for which amount they were entitled to be reimbursed by the plaintiff before the latter could recover possession of the premises. The court refused to find that the defendants were entitled to any reimbursement from the plaintiff for the buildings purchased from Mrs. Boyd de Arosemena, holding that the defendants must look to the last-named person for such reimbursement under the deed executed by her and delivered to them.

Judgment was entered in accordance with the findings of the trial court. From such judgment the defendants appeal to this court.

The appeal, therefore, involves mainly a single question of law. Mrs. Boyd de Arosemena erected the buildings with the consent of the owner of the land. The defendants bought the buildings from Mrs. Boyd de Arosemena in good faith. The evidence so shows and the trial court so found. The defendants made improvements in good faith with the knowledge and consent of the plaintiff. The trial court so found. The plaintiff, if put into possession of the premises, will come into possession not only of the

improvements made by the defendants, but also of the buildings erected by Mrs. Boyd de Arosemena. The present value of both will be added to the value of the plaintiff's land. Under these conditions should the plaintiff be required to pay the total value of all she is to get or only the value of a part?

This question seems to be covered fully by Article 739 of the Civil Code which is as follows:

The owner of land upon which another person, without his knowledge shall have built, planted, or sowed, shall have a right to make the building, planting, or sowing, his own, upon the compensation prescribed in favor of possessors in good or bad faith in the Title of Revindication, or to oblige the person who built or planted to pay him a just price for the land with legal interest for all the time he may have had possession thereof, and the one who sowed to pay him the rental and indemnify him for damages.

If the building, planting, or sowing shall have taken place with the knowledge and consent of the owner of the land, he shall be obliged, in order to recover it, to pay the value of the building, planting, or sowing.

Veles in his Commentaries thereon, volume 3, page 106, states as follows:

When one has erected or planted with the knowledge and acquiescence of the owner of the land, then, since the owner has tacitly consented in the works which have been executed on his property, it is natural that from his consent originate certain obligations which the law reduces to that which is just in this particular, that is, that in order to recover the land he shall have to pay the value of the building, planting, or sowing. While he can not so pay, he can not demand that the land be delivered to him.

The last paragraph of Article 739 of the Civil Code is based upon the broad general principle that when an owner of land permits value to be added to his land at the expense of others who add such value in good faith he can not profit therefrom by recovering possession unless, as even counsel for respondent admitted in his argument, he pays for what he gets. His consent to the improvements gives rise to an obligation which continues until he himself extinguishes it by payment of an amount commensurate with the actual value added to his property by such improvements. This is not to say that before recovering his possession the owner must pay the actual cash cost of the improvements. For the maker or makers of them may have had the use of them and they may have suffered deterioration from such use or from lapse of time. On the other hand, skill in their employment or conscientious care and oversight may have caused great appreciation over actual cost. The correct rule, therefore, is that the owner should pay the actual present value of *all* im-

provements to his premises made with his actual or implied consent, such value to be estimated as of the time when his right to recovery of possession is adjudicated. And the rule so stated is consonant both with equity and with the provisions of Article 739 of the Civil Code. Nor do we think that the articles of the code with reference to the subject of eviction, which were cited by respondent, either modify or were intended to modify this rule.

From the foregoing it is evident that in our opinion the court below was in error with respect to the method of ascertaining the amount to be paid by the plaintiff to the defendants before the former could recover possession of the premises described in the complaint. Instead of allowing the actual sum found to have been expended by the defendants for the improvements made by them the trial court should have determined the actual value of all the improvements remaining on the premises at the date of the trial, irrespective of whether such improvements were made by defendants or by Mrs. Boyd de Arosemena, provided only that such improvements were made in good faith and by consent of the plaintiff or her predecessors in interest.

In accordance with the views herein expressed and in an endeavor to avoid the necessity of remanding the cause for a new trial we have endeavored to find in the record evidence on which we could award to the defendants a proper sum. The record does not contain such evidence. We, therefore, caused the parties to appear before us by their attorneys and to produce witnesses to testify as to the present value of the improvements in question. Such witnesses were produced in open court before the court sitting at Ancon on the 15th day of September, 1913, and were duly examined and cross-examined with reference to the question at issue. On the evidence so adduced taken in connection with all the evidence in the record which comes to us from the court below we find that the present value of the improvements in question is \$2,000, United States currency, which sum we find the plaintiff should pay to the defendants before recovering possession of the premises described in the complaint.

It has been objected that the sum awarded may be larger than the plaintiff is able to pay or than she thinks she can pay profitably and that as a result the judgment of the court may in effect deprive her of the very property adjudged to her. The answer to this objection is that if she fails to enter into possession of her premises through failure to pay the sum awarded defendants she can still demand and receive rent and can invoke the aid of the

courts to enforce such demand. And she would be entitled to recover a monthly rental in an amount which would not only be a fair return on her investment in the land, but would also be a fair return on the increase of the taxable value of such land, if any, due to the presence thereon of the improvements referred to.

The judgment of the court below should be so modified that the plaintiff be required to pay defendants the sum of \$2,000 United States currency before recovering possession of the premises described in the complaint and as thus modified the judgment is affirmed.

Judgment modified.

WEEKS *versus* THE PANAMA RAILROAD COMPANY.

No. 117. Argued August 18, 1913. Decided September 13, 1913.

PLEADINGS. AMENDMENTS.

Under the Code of Civil Procedure, sections 102 and 103, an amendment of a pleading may be permitted at any stage of a proceeding provided the same does not change the character of the action, and provided the same kind and quality of evidence would be required to establish the allegations of both the original and amended pleadings, and a recovery under either would be a bar to recovery under the other.

NEGLIGENCE. RES IPSA LOQUITUR.

When the doctrine of *res ipsa loquitur* is properly applied, the *res* is the fact of the accident and injury coupled with facts and circumstances which bear a definite causal relation to the accident, separate and apart from any circumstantial or direct evidence, which points to any specific omission or act of negligence on the part of the defendant.

RES IPSA LOQUITUR. MASTER AND SERVANT.

The doctrine of *res ipsa loquitur* is not applicable in an action between master and servant when the servant himself was in control of or handling the agency which was the immediate cause of the accident.

Appeal from the Circuit Court of the Second Judicial Circuit;
Hon. William H. Jackson, Judge.

The facts appear in the opinion.

Charles R. Williams, for appellant. *Hinckley and Ganson* and *V. E. Bruno*, for appellee.

THOS. E. BROWN, J. This is an appeal from a judgment of the Circuit Court of the Second Judicial Circuit. The action was

brought to recover damages for personal injuries received from an explosion of dynamite and alleged to be due to the negligence of the appellant, defendant in the court below. Judgment was rendered in favor of the plaintiff in the sum of \$5,000.

The evidence shows that the plaintiff was in the employ of the defendant as a member of a "powder gang," engaged in blasting in the neighborhood of Paraiso. The work of a powder gang consists in "springing," loading with dynamite, and exploding holes which have been drilled previously by the "drill gangs." The first work of the powder gang is to "spring" the hole. "Springing" is exploding a few sticks of dynamite in the bottom of a hole for the purpose of enlarging it at the bottom so that it can contain a quantity of dynamite sufficient to break up the earth and rock. The dynamite is loaded into the hole by means of a long pole about $1\frac{1}{2}$ inches in diameter and varying in length according to the depth of the hole. This pole weighs from 10 to 15 pounds. It is used to shove the sticks of dynamite into the hole and place them in the pocket already made at the bottom by springing. After springing it is necessary to wait awhile for the hole to cool before commencing to load. It is usual to wait an hour and at times the interval between springing and loading is much longer than an hour. At the time of the accident complained of two methods were in use to discover whether the hole was sufficiently cool to make it safe to load it, viz, by holding the hands over the hole to determine whether the escaping air was warm or hot and by inserting the pole into the hole where it was allowed to remain for a time and then feeling of the pole. If either of these tests showed the hole to be either warm or hot, water was poured into the hole or loading was delayed until the hole cooled.

On October 11, 1911, the plaintiff went to his work as usual as a helper in a powder gang of which the foreman was one McDonald, one of the witnesses called by the defendant. About 9 o'clock in the morning the plaintiff was directed to begin loading a hole which had been drilled several days before. Before beginning loading the plaintiff tested the hole for heat by the customary method. He testified that it seemed to be cool, that he "put the pole into the hole and let it stay awhile and took it out and felt of it and the pole was cool." He commenced putting in the sticks of dynamite "pushing them down with the pole and tamping them around the pocket at the bottom of the hole with the end of the pole." The hole was one of a series of seven, and while the

plaintiff was engaged in loading, as above described, the dynamite in the hole he was working on exploded. The concussion also caused the next two holes which were partially loaded to explode. The plaintiff according to his testimony was very seriously injured.

At the trial in the lower court the plaintiff was the sole witness appearing in his behalf. To support an allegation contained in his complaint he testified that it was the rule to wait at least a half an hour after springing before beginning to load a hole and that at the time of the occurrence of the accident only 12 or 15 minutes had elapsed since the hole in question was sprung. He had, however, made no objection when the foreman ordered him to load and although he had written several letters to the president of the defendant company with reference to the accident and his injuries he had made no suggestion that the foreman was in any way negligent in this respect. On the other hand the foreman testified that the holes had been sprung more than 24 hours earlier and the foreman's testimony in this regard was corroborated by three members of the powder gang. The foreman further testified that before ordering the loading of the seven holes referred to he had personally inspected them and on such inspection they had appeared to be "all right and that when questioned by him before commencing to load the plaintiff had told him that the hole in question was all right." This last testimony of the foreman stands uncontradicted in the record.

The foreman expressed the opinion that the explosion might "have been caused by the pole striking the dynamite with too much force or a small rock getting between the dynamite and the pole." On the other hand the plaintiff stated that he looked into the hole by means of a glass which he carried, that he saw no rock and that he loaded the hole with all due care. During the examination of the foreman the court, by its questions, brought out the following testimony:

By the Court.

Q. What was the other work you had been doing that morning before commencing to load the hole that exploded prematurely?

A. We had exploded about 18 holes in the ridge below. They were about 40 or 50 feet below and about 100 feet away from the seven. They were 24 feet deep and some of them were straight down in the ground and some of them were inclined in the direction of the seven holes at an angle of 45 degrees. Heat is generated by explosion and will extend a few feet in the earth and rock depending on the nature of the ground, from the place of explosion. The ex-

plosion of these 18 holes occurred an hour before the loading of the seven holes and had no effect whatever upon them.

By the Court.

Q. If there were veins or crevices connecting any of the 18 holes with the hole Weeks was loading is it not possible that heat and gases would have been communicated to it, and is it not possible that heat and gases might have been generated in the hole after Weeks commenced to load?

A. Yes.

By the Court.

Q. Was Weeks using care, and was he a careful man?

A. Yes, he was a careful man, and so far as I could tell was loading the hole carefully.

The foregoing is the substance of the evidence from which the trial court found that the defendant company had been negligent.

The allegations of fact upon which negligence was predicated in the original complaint were contained in paragraph 5 thereof, which reads as follows:

That on the 11th of October aforementioned, plaintiff along with others was instructed by defendant's agent, the foreman in charge of blasting at the said relocation at Paraiso, to "load" holes at a spot that was not sufficiently cool, i. e., within 15 minutes after a prior discharge had been let off, contrary to the rule observed whereby half an hour's cooling is allowed before loading, with the result that a terrific explosion took place whereby plaintiff was thrown to a considerable height in the air and precipitated to the earth a considerable distance away.

At the close of all the testimony, in order to make the complaint conform to the proof with respect to the explosion of the 18 holes as hereinbefore quoted, and on the suggestion of the trial court, the plaintiff moved that he be permitted to amend the fifth paragraph of his complaint which motion was granted by the court over the objection of counsel for defendant company. The fifth paragraph, as amended, reads as follows:

That on the 11th of October aforementioned, plaintiff, along with others, was instructed by defendant's agent, the foreman in charge of blasting at said relocation at Paraiso to "load" holes at a spot which was not sufficiently cool, that is to say, in the vicinity where blasting has occurred within a short time prior to said injury complained of, and without the said foreman taking the necessary precaution to ascertain whether the spot or immediate locality was sufficiently cool to allow of a safe charging of the holes with dynamite, with the result that a terrific explosion took place whereby plaintiff was thrown to a considerable height in the air and precipitated to the earth a considerable distance away.

Although the amendment was allowed defendant's counsel did not plead surprise nor did he accept the court's offer of an adjournment to secure additional evidence to meet the new allegations.

In his brief in this court counsel for the appellant company makes four assignments of error.

1. That the lower court erred in refusing to grant defendant's motion for a nonsuit at the close of the plaintiff's case.
2. That the court erred in allowing the amendment to the complaint hereinbefore noted.
3. That the court should have granted judgment to the defendant on the law and the facts at the conclusion of the whole case.
4. That the award of damages was excessive.

The conclusion which we have reached with respect to the third assignment of error obviates the necessity of any consideration of the first and last assignments. Appellant's counsel, however, urges so insistently that it was error to allow the amendment to the complaint that we think it wise to discuss the assignment of error referring to such amendment.

Sections 102 and 103 of the Code of Civil Procedure which relate to amendments of pleadings are broad and liberal in their scope. Section 102 provides that where there is a material variance between the allegations of a pleading and the proof that "Courts shall not dismiss the action by reason of the variance, but shall upon such terms as may be just order the pleadings to be forthwith amended in accordance with the facts, and determine the action upon the actual facts established." Such amendments may be made at any stage of the action either in the Circuit Court or in the Supreme Court. Section 103 likewise provides that in furtherance of justice and on such terms as may be proper, at any stage of the action either in the Circuit Court or the Supreme Court, the court shall allow a party to amend any pleading by correcting any mistaken allegation or description in any respect "so that the actual merits of the controversy may speedily be determined without regard to technicalities, and in the most inexpensive and expeditious manner." In other words these provisions with reference to the allowance of amendments conform to the general scheme of procedure of the Codes of Procedure in force in the Canal Zone which is that technicalities shall not interfere with the accomplishment of a speedy and inexpensive conclusion of controversies. The sections provide against any injustice to the party objecting to the amendment

by providing that same shall be allowed on such just terms as may be proper.

In our opinion the amendment complained of was in accord with the provisions of the code. But it is insisted that the new allegations do not in any proper sense constitute an amendment but set up such an entirely different state of facts from that originally alleged in the complaint as to change the cause of action and substitute a new cause of action. If this contention were true allowance of the amendment would have been error. The general rule, however, is that an amendment is not objectionable as introducing a new cause of action when it merely restates the facts or grounds relied on for recovery but does not alter the inherent nature of the action. In actions *ex delicto*, for instance, it has been held repeatedly that so long as the facts added by amendment, however different they may be from those alleged in the original pleading, show substantially the same injury arising out of the same general transaction the amendment does not set up a new and distinct cause of action. If, however, the pleading of new matter had changed the action from one *ex delicto* to one *ex contractu*, or from an action based on negligence to one for malicious prosecution or libel or any other tort, then the amendment would be objectionable even under the broad and liberal provisions of the Code of Civil Procedure of the Canal Zone. In the case before us the action as stated, both in the original and the amended complaint, was founded on negligence and in both original and amended complaints grew out of the same transaction, viz, an explosion of dynamite resulting in injury to the plaintiff. The same quality and character of evidence would be required to establish the allegations of both original and amended complaints and recovery under either one would be a bar to recovery under the other. The amendment was therefore merely a change in the specifications of facts alleged to constitute the negligence and does not effect the substitution of a new cause of action.

The defendant's third assignment of error to the effect that at the close of the whole case the trial court should have found the issues in favor of the defendant both on the law and the facts raises the important question of law involved in this action.

It seems to be admitted that at the close of the case the record contained no direct evidence of negligence on the part of the defendant. If, however, it be said that some such direct evidence was contained in the plaintiff's statement that it was a rule to

wait at least a half hour after springing before loading and that the foreman violated this rule when he ordered the plaintiff to load at a time when only 12 or 15 minutes had elapsed after the hole had been sprung, then it may be answered that the plaintiff abandoned this theory when he amended the allegations of his complaint which set it up. Moreover, it would be difficult to give credence to this testimony in view of the positive evidence of the foreman and other members of the powder gang that the hole had been sprung 24 hours earlier and in the face of the plaintiff's own testimony that he made no objection to obeying the foreman's order to load and that although he had written several letters to the president of the defendant company concerning the accident and his injuries he had not suggested to the president that the foreman was in any way in fault. And that the trial court was of the opinion that there was no direct evidence of negligence is shown by an opinion filed with respect to the motion for a new trial in which opinion the trial court stated that in finding in favor of the plaintiff the maxim of *res ipsa loquitur* was applied to the facts and that the case was a proper one for the application of the maxim. The application of this rule of evidence must rest essentially on the absence of direct evidence of the defendant's negligence.

After consideration of all the facts and circumstances set forth in the record we are of the opinion that unless the maxim referred to by the trial court is applicable then the judgment should have been in favor of the defendant.

The maxim *res ipsa loquitur* as a distinctive rule of evidence has been employed by text writers and in court decisions with considerable looseness, uncertainty, and lack of precision. The result is a mass of cases in the reports, Federal and State, which are characterized by a noticeable absence of cohesion in theory, definition, and result. Many of these cases have been cited on the briefs of both counsel in the case at bar. Much of the uncertainty of application can, however, be avoided if it can be determined what is the thing, the *res*, which itself speaks and so permits an inference of negligence or, as it is sometimes stated, gives rise to a presumption of negligence.

The trial court stated the rule as follows, using the language employed in the case of *Breen vs. New York Central R. R.* (109 N. Y. 297):

There must be reasonable evidence of negligence but when the thing causing the injury is shown to be under the control of the defendant, and the accident

is such as, in the ordinary course of business, would not happen if reasonable care was used, it affords, in the absence of explanation by the defendant, sufficient evidence that the accident arose from want of care on his part.

The following statement from Shearman and Redfield on Negligence, section 59, has been frequently approved by the courts:

It is not that in any case negligence can be assumed from the mere fact of any injury; but in these cases the surrounding circumstances which are necessarily brought into view by showing how the accident occurred contain, without further proof, sufficient evidence of the defendant's duty and of his neglect to perform it.

The above language used by Shearman and Redfield is employed also in the headnote of the case of *Griffin vs. Manice* (166 N. Y., p. 193) which is a leading case.

The editor of *Cyc.* summing up cases cited from the reports of many of the States in the United States phrases the general rule for the application of the maxim as follows:

To render the maxim applicable the thing causing the injury must be shown to have been in the exclusive control of the defendant and the rule has no application where the injured person and the alleged negligent person were both in the exercise of an equal right and were each chargeable with the same degree of care (*Cyc.*, vol. 29, p. 592).

In the case of *Robinson vs. The Consolidated Gas Company* (194 N. Y., 37), the New York Court of Appeals said of the doctrine of *res ipsa loquitur*:

The *res* of that maxim, which is sometimes misused, is not simply an accident resulting in injury, but the accident and the surrounding circumstances necessarily shown by proving how the accident occurred. The doctrine does not permit a recovery without some proof of negligence, but it regulates the degree of proof required under certain circumstances. If proof of the occurrence shows that the accident was such as could not have happened without negligence, according to the ordinary experience of mankind, the doctrine is applied even if the precise omission or act of negligence is not specified, and even when it does not appear whether the accident was owing to some act done or to some act not done.

The maxim as used by the authorities we have quoted and as used in many other carefully analyzed cases decided in the courts of various States is based partly at least on the theory that where the defendant has exclusive control of the thing which has produced the accident it is within his power to produce evidence of the actual cause of the accident which the plaintiff is unable to present. And an analysis of these and other well considered cases has brought us to the conclusion that when the doctrine

of *res ipsa loquitur* is properly applied the *res* which itself speaks is the fact of the accident and injury coupled with facts and circumstances which bear a definite *causal* relation to the accident, separate and apart from any circumstantial or direct evidence which points to any specific omission or act of negligence on the part of the defendant. When, therefore, the thing causing the injury is shown to be under exclusive control of the defendant and the accident is such a one as could not occur without negligence, according to the ordinary experience of mankind, and there is proof of the accident and the injury coupled with proof of surrounding facts and circumstances which bear a causal relation to the accident, and there is no circumstantial or direct evidence of the omission of any specific duty which ought to have been done by the defendant or of the commission of any specific act which ought not to have been done, then in the absence of explanation by the defendant the thing itself speaks in such a way as to permit an inference of the defendant's negligence. According to the doctrine so stated the negligence of the defendant must necessarily be the only inference which can be derived reasonably from the proof. If any other reasonable inference is consistent with the facts in evidence the doctrine is not applicable for the reason that in such case the accident is shown by the proof to have been one which could have occurred without the negligence of the defendant. Nor can the inference of negligence be founded on conjecture. "Conjecture is an unsound and unjust foundation for a verdict. Juries may not legally guess the money or property of one litigant to another." (Midland Valley R. R. Co. *vs.* Fulgham, 181 Fed. Rep., p. 95.) Nor, it may be remarked, may courts sitting without a jury guess the money or property of one litigant to another.

It is sometimes said that in whatever terms the maxim of *res ipsa loquitur* may be stated it is never applicable in a case arising between master and servant. And it has been urged that this is the rule followed by the United States Supreme Court and by a majority of other Federal courts. The rule as applied by the United States Supreme Court in actions between master and servant is set forth with much clarity in the case of Patton *vs.* Texas & Pacific Railway Company (179 U. S., p. 658). The Patton case is a leading case and has been cited with approval and followed in cases decided by the various other Federal courts. In that case Mr. Justice Brewer delivering the opinion of the Supreme Court said:

First. That while in the case of a passenger the fact of an accident carries with it a presumption of negligence on the part of the carrier, a presumption which in the absence of some explanation or proof to the contrary is sufficient to sustain a verdict against him, for there is *prima facie* a breach of his contract to carry safely (*Stokes vs. Saltonstall*, 13 Pet. 181); 10 L. Ed., 151; *Railroad Company vs. Pollard*, 22 Wall. 341 (22 L. Ed., 877); *Gleeson vs. Virginia Midland Railroad*, 140 U. S., 435, 443 (11 Sup. Ct., 859, 35 L. Ed., 458) a different rule obtains as to an employee. The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employee to establish that the employer has been guilty of negligence. (*Texas & Pacific Railway vs. Barrett*, 166 U. S., 617; 17 Sup. Ct., 707, 41 L. Ed., 1136.) Second. That in the latter case it is not sufficient for the employee to show that the employer may have been guilty of negligence. The evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs.

It will be noted that in the above quotation the doctrine under discussion is referred to in a much more restricted sense than that in which we have set it forth. The court held that the mere fact of the accident itself would not, as between master and servant, give rise to a presumption of the master's negligence. So far the decision in the Patton case is not inconsistent with the meaning of the maxim as herein stated. But the Supreme Court goes further and holds that the evidence must point directly to the defendant's negligence. This is not very different in practical result from our statement hereinbefore made to the effect that the negligence of the defendant must necessarily be the only inference which can be derived reasonably from the proof and that if any other reasonable inference is consistent with the facts in evidence the doctrine is not applicable. But in any event the Federal courts generally, while refusing to hold that the mere fact of an accident raises any presumption of the master's negligence, have approved verdicts for the plaintiff in actions between servant and master wherein there was no direct or circumstantial evidence of any specific negligent omission or act on the part of the master but wherein the proof of the accident together with proof of the physical causes of the accident permitted no other reasonable

inference than that the accident was necessarily due to the master's negligence. And it is our opinion that cases might arise between master and servant in which the evidence would show the servant to be virtually so much a stranger to the matters and circumstances entering into the accident that it would be beyond all reason to apply to his cause of action any different rule of evidence from that applied to the cause of action of an actual stranger. In the case of *Griffin vs. Boston & Albany R. R. Co.* (148 Mass., p. 143) the court stated what seems to us the correct view. The court said:

Each case must depend on its own circumstances; and what would be sufficient proof of negligence in an action brought against a railroad company by a passenger or by a stranger, might not be so in an action brought by one of its servants. If the accident appears upon the evidence to be as consistent with the absence of negligence for which the defendant is responsible as with the existence of such negligence, the plaintiff must fail.

It should be said, however, that we have not found a well considered case in which the doctrine of *res ipsa loquitur* was applied in an action between master and servant when the servant himself was in control of or handling the agency which was the immediate cause of the accident. And the reason why the doctrine would not be applicable in such case is that in such case it would ordinarily be quite as consistent to infer that the accident was due to the servant's own act as to infer that it was due to the master's negligence. Moreover under the rule as we have laid it down the defendant must be in exclusive control of the thing causing the injury. The case of a plaintiff who is a servant in control of the agency causing the explosion does not, therefore, come within the rule for the application of the maxim as herein stated.

If the facts and circumstances set out in the record of the case at bar be analysed it will appear that the doctrine of *res ipsa loquitur* does not apply, and that, therefore, no inference of negligence can be derived from such facts and circumstances and no presumption of negligence arises therefrom.

It does not appear that the explosion of the 18 holes bore any necessary relation of any sort to the premature explosion in the hole at which the plaintiff was working. The existence of such a relationship is itself purely inferential and founded on several assumptions. It rests on the assumption that the hole which the plaintiff was loading, or the neighborhood thereof, was unduly affected by heat and that this heat in some way

caused the premature explosion, and such assumption must be made notwithstanding the fact that both the plaintiff and his foreman testified that the customary tests failed to disclose the presence of any heat. It rests upon the further assumption that heat generated by the explosion of the 18 holes an hour before the premature explosion was communicated to the place of the accident through crevices in the rock which must be assumed to exist. If, therefore, a presumption of negligence arises from the evidence it is a presumption which is founded on an inference which inference is itself based on several assumptions. To make an inference of defendant's negligence under such conditions would be to arrive at a verdict by pure conjecture.

Moreover the inference that the premature explosion was due to some act of the plaintiff himself is quite as consistent with the facts and circumstances disclosed by the record as is an inference of negligence on the part of the defendant. The plaintiff certainly was exercising some control over the agency which caused the accident. He was tamping and shoving the dynamite which exploded. It is certainly possible that without any want of care on his part his pole in some way caused a jar or shock which produced the explosion. In the foreman's opinion this might have been the cause of the accident and considering his 10 years experience with dynamite the foreman's guess should be thought as reasonable as any other.

We must, therefore, arrive at the conclusion that this is one of the many cases referred to in the case of *Patton vs. Texas Pacific R. R. Company*, *supra*, in which the plaintiff has failed in his proof.

It follows that the trial court should have found the issues in favor of the defendant.

The judgment of the lower court is, therefore, reversed and judgment absolute in favor of the defendant is ordered.

Reversed.

DENST *et ux. versus* GRAMLICH *et al.*

No. 118. Argued July 16, 1913. Decided September 15, 1913.

LIBEL. WORDS ACTIONABLE.

To publish in writing of a married woman that she "sent her children out of the house so that she could entertain men callers and that her conduct in this respect was brazen and the common talk of the neighborhood," and, "that during the entire absence of her husband, for about a week, men stayed at her house night after night," constitutes libel.

LIBEL. PRIVILEGED COMMUNICATION.

A communication which might come within the class of those known as privileged, is nevertheless actionable provided the one publishing the same knew at the time that the statements therein contained were false.

Appeal from the Circuit Court of the Second Judicial Circuit;
Hon. William H. Jackson, Judge.

The facts appear in the opinion.

Felix E. Porter, for appellants. *Hinckley* and *Ganson*, for appellees.

THOS. E. BROWN, J. This action was begun in the Circuit Court of the Second Judicial Circuit. The complaint alleged that the defendants had published certain alleged libelous statements with reference to Mrs. L. R. Denst, one of the plaintiffs. After various preliminary proceedings the case came on for trial and judgment was rendered in favor of the plaintiffs for damages in the sum of \$2,000. From this judgment the defendants appeal to this court.

It appears that the various families engaged as parties to this action lived in Commission quarters in Gorgona and were near neighbors. The plaintiffs are husband and wife and their four children seem to have been unrestrained and undisciplined. These children came to be considered a nuisance in the neighborhood. They ran the streets in the daytime and often at night. They were noisy, boisterous, and troublesome. They conceived and carried out successfully plans for the disturbance of their elders, just such schemes and devices in contravention of peace and quiet as have been conceived and perpetrated by the growing youth of all climes from time immemorial.

Three of the defendants, Mrs. J. P. Gramlich, Mrs. E. O. Bratt, and Mrs. W. J. Donaldson prepared a letter of complaint ad-

dressed to the District Quartermaster of Gorgona in which various allegations were made respecting the conduct of the Denst children and respecting the actions of Mrs. Denst and her guests in the quarters occupied by the Denst family. This letter was signed by Mrs. Gramlich, Mrs. Bratt, and Mrs. Donaldson with the knowledge of their respective husbands and delivered to the District Quartermaster. The latter referred the letter to the Chairman of the Isthmian Canal Commission who ordered an investigation of the various matters therein alleged and such investigation was made by a lieutenant of the Police Department. It appears also that before the delivery of the letter to the District Quartermaster it was exhibited by Mesdames Bratt, Gramlich, and Donaldson to various persons in Gorgona and was read by such persons. Its contents, therefore, became a matter of more or less notoriety in Gorgona.

The first part of the letter contained various specifications with reference to the Denst children. It stated that they were encouraged by the mother to run at large in the streets; that they were profane, insulting, and dirty in language and a menace to the neighborhood; that they kindled fires under the houses, threw stones on the roofs, exploded fire crackers on the verandas and were abetted by their mother in such conduct. The letter then proceeded in the following words:

As already stated, the Denst children are encouraged and sent out on the streets, both day and night by their mother, for two reasons. First, because they are so noisy and fussy that she can not stand to have them around the house. Second, and most important, is to make room and get them out of hearing, so Mrs. Denst can receive and entertain her affinities, in other words, so she can entertain men callers. So common and brazen has this conduct become that it is common talk of the neighborhood.

Some little time ago, Mr. Denst was out of town for a week and during his entire absence men stayed there night after night, Mrs. Denst being assisted by Mrs. Jackson, her daughter, and the negro servant. Time after time this has been the case until we are forced to take action in defense of our children and our homes.

We therefore request that the whole family be transferred to some other locality at once.

Yours respectfully,

MRS. J. P. GRAMLICH, 106-C.

MRS. E. O. BRATT, 21-A.

MRS. W. J. DONALDSON, 22-B.

Omitted by oversight.—On Saturday evening, July 13, Miss Lily Jackson and the negro girl, Maybel, were on the Denst gallery laughing and talking

loudly, and singing suggestive songs, to such an extent that it drove Mrs. Fogleman, House 23, into a spell of hysterics, and a doctor had to be called.

MRS. W. J. D.

On the quoted portion of the letter addressed to the District Quartermaster the plaintiffs and respondents base their claim for damages. Their complaint alleges that the exhibition of the letter was a publication of false and defamatory matter, that it tended to impeach and did impeach the virtue and reputation of the plaintiff, Mrs. Denst, and thereby exposed her to public ridicule and contempt. The complaint further alleges that the quoted words meant and were understood to mean that Mrs. Denst was an unchaste woman who was operating a disorderly place during the absence of her husband and that she was sending her children into the streets to facilitate the accomplishment of improper and unlawful purposes.

To each of these allegations the defendants entered a specific denial.

In his brief and argument counsel for the appellants discussed many questions in *extenso*. Of these questions two only seem to us of any considerable importance, viz:

1. Were the words used libelous?
2. Was the letter complained of a privileged communication?

In regard to the first question we think there can be but one answer. The evidence contained in the bill of exceptions satisfies us that the cause inducing the production of the letter addressed to the District Quartermaster was the annoying conduct of the Denst children. Indeed counsel for the appellants so stated during the course of his argument. But such conduct would hardly have caused the District Quartermaster to grant the request of the petition and remove the Denst family from the neighborhood.

The signers of the letter, therefore, added the latter portion of the letter evidently intending by such addition to give needed strength to their petition by connecting the disorderly conduct of the children with the alleged "brazen" and loose conduct of their mother. This portion of the letter reduced to its lowest terms is as follows:

(a) That Mrs. Denst sent her children out of the house so she could entertain men callers and that her conduct in this respect was brazen and the common talk of the neighborhood.

(b) That during the entire absence of her husband, for about a week, men stayed at her house night after night; that Mrs.

Derst was assisted by a Mrs. Jackson, the latter's daughter, and a notorious negro servant; and that the defendants were forced to take action in defense of their homes and their children.

What can be understood from such statements? What inference must necessarily be made as to the character of a woman, who, during the absense of her husband sends her children out on the streets so that unhindered she may entertain men who stay at her house night after night? To the man on the street such a statement would be a charge impugning the virtue of a woman concerning whom it was made. And the statements certainly fall within the rule of law that it is sufficient to make a publication libelous if it is of such a character that persons unacquainted with the plaintiff and hearing of her for the first time through the said letter would and do understand therefrom that she is a person of low character and guilty of improper and immoral conduct. A charge so understood is a false and malicious charge. It was not error, therefore, for the trial court to find that the statements and words referred to were libelous.

(2) A privileged communication is one which on its face would be libelous but is prevented from being so by reason of circumstances rebutting the existence of malice, and occurs where any person having an interest to protect, or having a legal or moral duty to perform, makes a communication to another in protection of his interest or in performance of his duty; here, although the communication may contain matter that would ordinarily be actionable, yet here it is not actionable if the communication is fairly and honestly made in bona fide belief of its truth and without any gross exaggeration. (Starkie on Libel and Slander, p. 460.)

A communication made in good faith upon any subject matter in which the party communicating has an interest or in reference to which he has a duty, either legal, moral or social, if made to a person having a corresponding interest or duty, is privileged, and the burden of proving the existence of malice is cast upon the person claiming to have been defamed. (Newell on Slander, sec. 391.)

It hardly need be said that conditions of living are such in the several settlements of the Canal Zone that there are many matters in which District Quartermasters and occupants of Isthmian Canal Commission quarters might have a common interest. Among such interests would be the preservation of good order in the quarters and the protection of quarters buildings from danger of serious injury or destruction. And in respect to such matters of common interest letters passing from occupants of quarters to the quartermaster might come within the class of communications commonly known as privileged, provided, however, the

statements contained in such communications were characterized by good faith and the persons making them had a bona fide belief in their truth and reasonable ground for such belief.

But the statements complained of in the case before the court are not within the limitations above set forth. The proof shows that the three women who signed the libelous letter had no belief whatever in the truth of the allegations as quoted in respect to the conduct of Mrs. Denst. The women themselves testified that they knew nothing against the virtue of Mrs. Denst. But in almost the same breath they indulged in new slurs against her, and gave evidence of a frame of mind towards Mrs. Denst which, in this court's view, is distinctly indicative of express malice. For instance, Mrs. Bratt, one of the defendants, testified that she knew nothing against the character of Mrs. Denst and that she had never intended to injure the latter's reputation in any way, but she had, however, at one time seen Mrs. Denst in a partially undressed condition call out to a Mr. Jones to come onto the porch of her house and that he had gone into her, Mrs. Denst's, room and remained there about 15 minutes with the door closed. Moreover, the letter was exhibited to various persons in Gorgona between whom and the signers there does not appear to have been any relations on which privilege could possibly be predicated. We can arrive at no other conclusion, therefore, than that the statements complained of are libelous and not privileged and are for that reason actionable.

The judgment of the lower court should be affirmed with costs to the respondent in both courts.

Affirmed.

CANAL ZONE *versus* ZALDIVAR.

No. 113. Argued May 14, 1913. Decided May 28, 1913.

VERDICT. CHANGE THEREOF BY JURY.

When a crime is separated into degrees, the verdict must specify the degree, but where the verdict does not do so, and the jury alters and amends the same before leaving the jury box there is no error.

MURDER. PENALTY.

Section 149 of the Penal Code which provides that "Every person guilty of murder of the first degree shall suffer death or, where there are extenuating circumstances, confinement in the penitentiary for life," leaves to the discretion of the judge of the trial court the fixing of the penalty, and this court will not alter the same unless there has been a manifest abuse of discretion.

Appeal from the Circuit Court of the First Judicial Circuit;
Hon. H. A. Gudger, Judge.

The facts appear in the opinion.

Oscar Teran, for appellant. *Charles R. Williams*, for appellee.

THOS. E. BROWN, J. The defendant, appellant above named, was charged in the Circuit Court of the First Judicial Circuit with the offense of murder. He was brought to trial on the 11th day of December, 1912, before the Hon. H. A. Gudger, Circuit Judge, and a jury. The jury found the defendant guilty of the crime of murder in the first degree, and the court thereafter pronounced sentence of death. Upon the denial of his motion for a new trial appellant perfected his bill of exceptions and the same duly came on for argument before this court on the 14th day of May, 1913.

In the argument before this court appellant's counsel practically abandoned all the several assignments of error raised by his bill of exceptions, and only one of such assignments of error merits any consideration. It appears that when the jury came into the court to render its verdict it returned a verdict of "guilty as charged." This verdict was immediately after altered and rewritten to read, "guilty of murder in the first degree as charged." The law of the Canal Zone provides that when a crime is separated into degrees the verdict must specify the degree. When, therefore, in order to comply with this requirement, a jury alters and amends its verdict before leaving the jury box, there is no error. But appellant's counsel contends that because the information does not allege premeditation and deliberation, *ipsisimis verbis*, the said information charges only murder in the second degree and that it was, therefore, error to allow the jury to alter its verdict from "guilty as charged" so as to read "guilty of murder in the first degree as charged." It appears, however, that after allegations of the facts the information contains the following allegation, viz:

And so the said Francisco Zaldivar did, in manner and form aforesaid, maliciously, wilfully, feloniously, and of his malice aforethought, kill, etc.

In my opinion the words quoted always embrace within their legal intentment both murder perpetrated with premeditation and deliberation and also second degree murder unless the information also contain qualifying words which negative the premedi-

tation and deliberation necessary to constitute murder in the first degree and so reduce the charge to that of murder of the second degree solely. In the information filed in the case at bar no such qualifying words are found. So far as concerns the information, therefore, it was within the right of the jury to find the defendant guilty of murder of the first degree in the manner and form set out in the record.

During his argument counsel for appellant attempted to persuade this court to modify the judgment of the court below by changing the punishment imposed from the death penalty to imprisonment for life. Such endeavor was based on the theory that the records shows mitigating circumstances and the section of the Penal Code which provides that when there are extenuating circumstances the penalty for murder of the first degree shall be imprisonment for life. (Penal Code, sec. 149, as amended.)

Every person guilty of murder of the first degree shall suffer death or, where there are extenuating circumstances, confinement in the penitentiary for life.

This section relates to penalty only. It provides an alternate punishment for the crime of murder in the first degree. Whether that punishment shall be death or confinement in the penitentiary for life is a question addressed to the judicial conscience of the trial judge and is to be determined by him in the light of an honest consideration of the facts and circumstances of the case, just as he determines by an impartial consideration of the facts whether he shall impose a term of ten, fifteen or twenty years imprisonment as a punishment for second degree murder.

And from the very fact that the sentence in this case was that the defendant should suffer death it is to be presumed that the trial judge concluded that the facts of the case do not disclose any extenuating circumstances.

There is no question, however, of the right of the Supreme Court to modify the judgment of the lower court in a criminal case when good cause is shown. (Code of Criminal Procedure, sec. 278.) But this authority should not be exercised merely to satisfy a whim or a sentiment. Such power was conferred upon the court for the sole purpose of correcting the abuse of discretion by the trial court, and should not be employed except in the rare cases where manifest injustice would otherwise be effected. It is claimed, however, that the case at bar is one of such rare cases. This claim makes it necessary to examine the facts set out in the record.

It appears that Zaldivar and one Julia Vega, who was a woman of ill repute, had been living together for about a year prior to the occurrence detailed in the record. On the night of November 26, 1912, the two had had a quarrel with reference to a man with whom the appellant had found Julia Vega. This quarrel had resulted in police officers of the City of Panama entering the room occupied by the woman in a cantine known as "La Floresta." The woman then apparently threatened Zaldivar that if he further troubled her she would turn him over to the police. Sometime thereafter, between 1 and 2 o'clock in the morning of the 27th of November, 1912, Julia Vega and a woman named Petra Garcia together with one Gonzales entered a coach and started for a drive on the Sabanas road. Gonzales appears to have been a friend of Petra Garcia and was not the man over whom the quarrel between the defendant and Julia Vega arose.

Shortly thereafter Zaldivar accompanied by three other men also entered a coach and drove through the streets of Panama and out upon the Sabanas road. It does not appear that the men with Zaldivar were aware of any intention on his part to commit a crime. At several points the coach containing the men was stopped and Zaldivar inquired of persons on the street whether they had seen a coach containing some women. At the place called "Tumba Muerta" which is in the Canal Zone the coach containing the women turned around just as Zaldivar's coach was overtaking it. There is evidence that Julia Vega ordered the coachman to turn because she had seen Zaldivar's coach and was afraid that if she tried to escape, the defendant would assault her as he had assaulted her some months prior to that day. As the two coaches were approaching each other some one in defendant's coach ordered the driver of the other coach to stop. Zaldivar jumped to the ground, and with a revolver in his hand ran to the coach containing the women. He got on the step of the coach on the side on which Julia Vega sat. Immediately he asked Julia Vega who was with her. She made no reply. He asked her why she sent him to the police and said he was going to kill her because she was a "whore." The Garcia woman cried out to him not to "compromise" himself. Immediately Zaldivar raised his revolver, fired at Julia Vega, and followed this shot by two more. All three bullets entered the woman's body and from one of the wounds thereby made she died almost instantaneously.

There was evidence that Zaldivar had been drinking to a considerable extent, but none of the witnesses noticed that he was

intoxicated at the time of the occurrence or during the drive from Panama and along the Sabanas road. The trial court submitted the question of intoxication to the jury charging them very fully and fairly on the subject of the relation of intoxication to intent, premeditation, and deliberation, and the jury evidently were not impressed by the defendant's own testimony that he was drunk.

In these facts there does not appear to me to be anything that can be considered as in extenuation of the crime of which the appellant had been convicted. Certainly it can not rightly be said that extenuating circumstances are so manifestly present in this record that the trial court erred when it sentenced the defendant to suffer death.

The record therefore discloses no error prejudicial to any substantial right of the defendant.

The judgment of the lower court should therefore be affirmed.

Affirmed.

WM. H. JACKSON, J., dissenting. At the trial of this case in the Circuit Court of the First Judicial Circuit, on December 11, 1912, the jury found the defendant guilty of murder in the first degree, and after a motion for a new trial had been made and overruled by the court, thereafter, the court sentenced the defendant to death, the extreme penalty of the law.

After careful consideration of the case on appeal to this court, I find myself unable to agree with my associate in his opinion of affirmance herein. I will endeavor to briefly state my reasons for my dissent, as follows: First, the trial court failed to instruct the jury that if they found the defendant guilty of murder in the first degree they might consider whether or not there were extenuating circumstances, in which case the penalty, pursuant to section 149 of the Criminal Code, would be confinement in the penitentiary for life, and not death; and second, that even if it be conceded that the question of extenuating circumstances was a matter not properly for the consideration of the jury, but one for the court in fixing the punishment, nevertheless this court has the right to inquire as to whether there were extenuating circumstances, and in the determination of this question, that we should reach an affirmative conclusion.

First. The charge of the court limited the jury strictly to finding the defendant guilty of either murder in the first or in the second degree. The court in its charge referred to excusable homicide, justifiable homicide, and manslaughter, upon which

the defendant had requested charges to the jury, and then stated to the jury as follows:

I will instruct you that you must eliminate these from your consideration. There is no evidence that justifies the conclusion that the defendant is either excused, or that he acted in self-defense, or that there were sufficient heat and passion with provocation, as to reduce his crime to that of manslaughter.

The next two questions, murder in the second degree, and murder in the first degree, will be submitted to you, and these two alone.

Further, the Court charged the jury:

If you should find as a matter of fact that the defendant followed the deceased for the purpose of slaying her, and that he met the coach in question, got out of the coach, stepped on the steps of the coach where the deceased was riding, drew his pistol, and fired at her deliberately, either once, twice, or thrice, and that death ensued from that act of his, you will find him guilty of murder in the first degree.

If you find as a matter of fact that he did not follow her for the purpose of killing her, but that he went to the Sabanas, and that, on meeting her, he conceived and formed the design to kill her, and, in pursuance of that formed design, he used the pistol as above set forth, which resulted in her death, by a shot from a pistol held by him, then he would be guilty in this case of murder in the first degree.

Now looking at the latter part of this charge, wherein the court tells the jury that even if they should find that the defendant did not follow the woman for the purpose of killing her, but that on meeting her he suddenly conceived and formed the design of killing her, and in pursuance, did so shoot and kill, while this is correct as a strictly abstract proposition of law, nevertheless, to my mind, it is in precisely such cases as this that the jury in a murder trial should at least have the opportunity of finding whether or not there were such extenuating circumstances as would make imprisonment for life instead of death a sufficient punishment for the crime.

But my associate in his opinion and judgment of affirmance of the death sentence, maintains that the finding of extenuating circumstances is not the function of the jury, but the final and conclusive function of the trial judge. To this I can not agree. Section 149 of the Criminal Code, as originally enacted, reads as follows:

Every person guilty of murder in the first degree shall suffer death, or if there be extenuating circumstances, or upon a plea of guilty, confinement in the penitentiary for life.

It will thus be seen that as the law originally stood, any person accused of murder could escape the death penalty by a plea of

guilty; upon such a plea being entered, the judge had not then the power to impose the death penalty, but was limited to the imposition of a sentence of confinement in the penitentiary for life.

It can not therefore with reason be held that under our laws the punishment for murder in the first degree was left solely and exclusively with the trial judge. If a man could escape death by a voluntary plea of guilty, why could he not do so by a jury's finding of extenuating circumstances? This is particularly true if we remember that in many States of the Union the power is expressly given to the jury, in finding a verdict of guilty in the first degree, to likewise fix the punishment therefor, that is, to say in their verdict whether the punishment shall be death or imprisonment in the penitentiary for life.

Our codifiers who enacted the present law must be presumed to have had in mind the fact that this is peculiarly the function of the jury and not of the judge. Why say that if there are extenuating circumstances the punishment shall be imprisonment for life and then give the accused the right to trial by jury in such case, if it were not intended that the jury as a body, looking at all the facts and circumstances, should have the right to find this fact? Otherwise the provision for extenuating circumstances becomes nugatory so far as the right of the accused with the jury is concerned, and this fact must then rest in the opinion and judgment of one man instead of with a jury of twelve.

In my judgment the right of the trial court, as my associate finds in this respect, is not analogous to the discretion lodged in the court in the matter of fixing the number of years that shall be imposed upon one found guilty of murder in the first degree, as to whether the punishment shall be 10, 15, 20, or a greater number of years. There is a wide and fundamental difference between the fixing of the number of years, which is allowed as a matter of judicial discretion and the determination of the solemn question of whether the punishment shall be death or imprisonment for life. It is not consistent with the American idea of justice that where murder in the first degree may be punished by either death or imprisonment for life, that the circumstances which must govern the imposition of this punishment should be found by the judge alone and not by the jury.

This is not a case where the punishment must be left to the discretion of the court pursuant to the provisions of Section 24, page 85 of the Criminal Code, which provides;

Whenever in this code the punishment for a crime is left undetermined between certain limits, the punishment to be inflicted in a particular case must be determined by the court authorized to pass sentence, within such limits as may be prescribed by this code.

Because here the law itself specifically provides the punishment. In the one case it says the punishment shall be death; in the other, where the existence of extenuating circumstances has been found, it says that it shall be imprisonment for life. When the fact of extenuating circumstances has been passed upon, as it should be by a jury, there is no discretion left the court. And there should not be a discretion left to a single judge to determine the all-important question of life or death, as there is to determine the number of years of imprisonment in second degree murder. To hold otherwise is to render nugatory the express provision of the law of the Canal Zone that the accused is entitled to a trial by jury "in cases wherein the penalty of death or imprisonment for life may be inflicted." If this means anything at all, it means that where the punishment may be either death or imprisonment for life, the jury must pass upon the facts that fix the punishment the judge must then necessarily impose. Otherwise the trial upon the question of imprisonment for life is by the court and not by the jury, contrary to the express provision of the law.

Now the Executive Order of July 30, 1909, modified section 149 by eliminating the plea of guilty as a means of escaping the punishment of death. But the Executive Order expressly recognized the existence of extenuating circumstances as such means. This Order was made by President Taft, himself a most able and learned jurist, who well knew that according to the American idea the existence or nonexistence of extenuating circumstances was a function of the jury and not of the court.

To my mind the defendant was deprived of a most substantial right by the failure of the court to charge the jury on the question of extenuating circumstances, and although the specific request to charge on this point was not made by the defendant, nevertheless the record shows that "to the giving of which and each and every one of said instructions the defendant by his counsel then and there duly excepted." And to my mind this exception was sufficiently broad to cover the defendant's rights in this respect. The prejudice to the defendant's rights from this failure so to charge is further apparent from the fact that the record discloses that the jury after being out, returned to the court and asked for additional instruction as to the proper definitions of first and

second degree murder. This would indicate that the jury, after deliberating some time, were in some doubt as to whether the verdict should be for murder in the first or the second degree. And if at that time the court had instructed them that looking at all the facts and circumstances of the case, they might find the defendant guilty of murder in the first degree with extenuating circumstances, who can say that the jury would not have so found? From the fact that they were evidently hesitating between a verdict of murder in the first and the second degrees, it is indeed probable that they would have found extenuating circumstances in connection with their verdict of murder in the first degree.

Second. But if this right belonged to the trial judge instead of the jury, nevertheless this court has the right to review and to modify the action of the trial court in this respect. Section 533 of the Code of Civil Procedure is broad and comprehensive in this respect, as follows:

The Supreme Court may, in the exercise of its appellate jurisdiction, affirm, reverse, or modify any final judgment, order, or decree of a Circuit Court, regularly entered in the Supreme Court by bill of exceptions, appeals, or writ of error, and may direct the proper judgment, order, or decree to be entered, or direct a new trial, or further proceedings to be had, and if a new trial shall be granted, the court shall pass upon and determine all the questions of law involved in the case presented by such bill of exceptions and necessary for the final determination of the action.

Acting under the provisions of this section this court recently increased the verdict of the court below from \$500 to \$1,200 in a personal injury case. If the Supreme Court can review and increase the finding of a money judgment in a civil case, surely it can decrease the punishment in a criminal case.

In fact, the Prosecuting Attorney in his oral argument conceded that this court would have the right to modify the sentence of the court to the extent of our finding extenuating circumstances and imposing a sentence of imprisonment for life. But he contended, first, that there were no extenuating circumstances, and second, that the question of extenuating circumstances, being, as he contended, a question for the court and not for the jury, was never presented by defendant's counsel for the consideration of the court, and that therefore the defendant's rights in this respect have been lost. I can not bring myself to hold that even if this were a function of the court, that because the trial court was not asked for an affirmative finding thereon, the defendant must, forsooth, suffer the awful, ignominious death upon the

scaffold, if, as a matter of fact, there were extenuating circumstances in the case.

It is true, section 235 of the Criminal Code provides for a hearing by the court for the purpose of fixing the extent of the punishment, where "a discretion is conferred upon the court as to the extent of the punishment," But, as stated, this is not a matter of judicial discretion, but a matter for the solemn finding of the jury.

To my mind there were such extenuating circumstances in this case as would make confinement in the penitentiary for life a sufficient punishment for the crime as proved at the trial. Section 148 of the Criminal Code provides that murder which is "perpetrated by means of poison, laying in wait, torture, or by any other wilful, deliberate, or premeditated act or acts, or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, or mayhem, is murder of the first degree, and all other kinds of murders are of the second degree." In these cases the penalty of death is prescribed, and in such cases the accused, properly found guilty, should unquestionably suffer the penalty of death, from which no mawkish sentimentality should relieve him. But section 149 contemplates that there may be extenuating circumstances notwithstanding the defendant may be technically guilty of murder in the first degree. These are not idle words; they evidently mean something; and they are evidently intended to apply to just such cases as the present, where the shooting was the result of sudden passion, done by an immature youth, partly intoxicated, and suddenly finding his mistress in the company of another man, there being no evidence of a preconceived, carefully laid plan to commit the deed. The evidence shows that this boy, Zaldivar, was enamoured of a woman of the underworld, of the name of Julia Vega; that he had been living with her as his mistress for about a year; that they quarreled; that he had previously been arrested for striking her; that on the night in question she had a policeman take him from her room; that thereafter he drank excessively—the evidence, however, not showing that he was so drunk that he did not know what he was doing. One witness, however, Pedro Valdez, testified that on the night in question he drank over 12 glasses of beer; others, that he drank whiskey and rum besides. In this half drunken condition he started for a drive on the Sabanas with three companions, and it is true that he inquired from two persons along the road if they had seen women driving ahead. There is

no evidence in the case to show that after the defendant was ordered out of the woman's room he went and armed himself; the only testimony on this point is that of the defendant himself to the effect that he had had a pistol for a long time and had frequently carried it.

The man who has premeditated, cold-blooded murder in his heart does not ordinarily take with him a coachman and three companions when he starts in quest of his victim. The cold-blooded murder that merits death is generally done in a more secretive, more cunningly planned way, generally with a view to a possibility of escape. But in this case the evidence shows that there were present at the time on the Sabanas, these three companions, the driver of his coach, three occupants of the other coach, and the driver of that coach; and to my mind it shows that finding his mistress then in the company of another man, and half-crazed with drink and jealousy, he suddenly and without any preconceived plan or idea of assassination, fired the fatal shot. This may be murder in the first degree as defined by the court wherein it said in its charge to the jury as follows: "If you find as a matter of fact that he did not follow her for the purpose of killing her, but that he went to the Sabanas, and that on meeting her, he conceived and formed the design to kill her, and, in pursuance of that formed design, he used a pistol as above set forth, which resulted in her death, by a shot from a pistol held by him, then he would be guilty in this case of murder in the first degree." But there are circumstances from which the jury would certainly have been justified in finding extenuating circumstances. Otherwise, to my mind, the words "extenuating circumstances" in section 149 and in the Executive Order of President Taft are meaningless and confer no rights upon the accused.

But if I am in error in my conclusion that this was the function of the jury and not of the trial judge, nevertheless, the facts from the record, which I have carefully read and reread, indicate so strongly to my mind as a judge upon the reviewing court, that there were extenuating circumstances, that I feel, either that a new trial should be awarded, with directions for a charge to the jury at the next trial upon the question of extenuating circumstances, or that we should find the existence thereof and accordingly modify the sentence to imprisonment for life. Holding these views, I dissent from the opinion and judgment of affirmance of the death penalty herein.

CANAL ZONE *versus* HOUSTON.

No. 119. Argued August 27, 1913. Decided September 13, 1913.

MURDER. INFORMATION.

An information for murder in the second degree is proper if it negatives all the essential ingredients of murder in the first degree.

MURDER. ALLEGATION OF PLACE OF DEATH.

The place of death of the deceased is not an essential averment in an information for murder.

Appeal from the Circuit Court of the Third Judicial Circuit;
Hon. Thomas E. Brown, Jr., Judge.

The facts appear in the opinion.

Hinckley and Ganson, W. C. Todd and W. H. Carrington, for appellant. Charles R. Williams, for appellee.

GUDGER, C. J. Information was duly filed against the defendant charging him with murder in the second degree and he was tried at the May term of the Circuit Court of the Third Judicial Circuit, convicted, sentenced, and appealed. The facts adduced at the trial were few and not seriously contested. The Government introduced testimony to show that the defendant approached the deceased in the road in front of the Y. M. C. A., and that there were some words between them; that all of a sudden a shot was fired, one of the men falling down to the ground, the other standing. The person who fired the shot was the defendant and the person who fell wounded was Harry Stern. Harry Stern was making no effort at attack upon the defendant at the time the shot was fired, had no weapon in his hand and none was found on his body immediately after. The deceased was taken from Gatun to Colon Hospital and there lingered three days and died. The death of the deceased was proved by the physicians and others who knew him in his life and who saw and recognized him after his death. It was also clearly shown that he died from the effects of the wound he received at the hands of the defendant. The alleged confession of the defendant was offered in evidence.

The Government rested and the defendant took the stand and gave his testimony, as follows:

On the morning of February 8, last, when he went to make a fire in the stove, he found an envelope and in it pieces of a letter torn up evidently intended to

be destroyed. He saw the words "my dear wife" on one of the pieces and his curiosity was aroused. He put them into his pocket and during the day pieced them together. The letter showed compromising relations between his wife and the writer of the letter. On the same day, when sitting down to supper, defendant asked his wife who had been at supper the night before. She answered "No one." He then asked her if Stern had not been there and she answered in the negative. He then told her of the letter he had taken out of the stove that morning and which she evidently intended should be burned. When he showed her the pieces of the letter she snatched them from him and put them in her mouth, proceeding to chew them up and tried to swallow them. Defendant forced her to spit them out. She commenced crying and screaming and the neighbors came in. In the meantime the defendant had drawn from her the information that Harry Stern had written the letter. Defendant left the house, going toward the commissary, met with Harry Stern, accused him of writing the letter and asked him if it was true. Stern neither admitted nor denied the writing and the defendant fired one shot which took effect on the deceased.

Omitting caption and formal parts, the essential elements of the information are as follows:

That the defendant on the 8th day of February, 1913, in the Circuit aforesaid, did then and there, with malice aforethought unlawfully kill and murder one Harry Stern, a human being, by shooting at and wounding said Harry Stern with a pistol, under circumstances lacking that wilfulness, deliberation, and premeditation constituting murder in the first degree, and from which pistol shot wound the said Harry Stern did, on the 11th day of February, 1913, die: and so the said J. Frank Houston, in the manner and form aforesaid, did then and there commit the offense of murder in the second degree.

At the hearing a motion was made by defendant's attorneys for trial by jury. A demurrer was also filed which alleged:

First.—That the use of the words "malice aforethought" in the information makes the offense murder in the first degree.

Second.—That if the charge in the information designates murder in the second degree and not murder in the first degree, as it clearly is from the essential allegations of the said information, defendant is prejudiced in his right to have a jury trial.

Third.—That the words "under circumstances lacking that wilfulness, deliberation, and premeditation" are conclusions and should not be in such manner incorporated in the information.

Later and by permission of the court, another demurrer was filed which alleges:

First.—That the information does not substantially conform to the requirements of the penal code of the Canal Zone.

Second.—That the facts stated do not constitute a public offense and

Third.—That the words “under circumstances lacking that wilfulness, etc.,” are conclusions, and should not be in such a manner incorporated in the information.

A jury trial was not allowed by the court and the demurrer was overruled, these forming the grounds for an appeal.

After the case reached this court an additional objection was made that the information did not state specifically the place of death of the deceased and for this reason should be quashed.

The laws of the Canal Zone, adopted September 3, 1904, provided that in all cases of felony the questions of law and fact should be passed on by the presiding Circuit Judge, with the exception of those cases where the penalty of death or imprisonment for life might be inflicted and that in these cases the judge should associate with him the two municipal judges, or, in case of their incapacity, two other persons, to pass on the question of fact in connection with himself. This remained the law until February 8, 1908, when a jury trial was given in cases where the penalty would be death or imprisonment for life, so that from then up until the date of July 4, 1913, all persons indicted for an offense, not murder in the first degree, had no right to a trial by jury. At that date, July 4, 1913, a jury trial was extended to all cases of felony. It will be seen from the above that at the time of the alleged crime, the filing of the information and the trial, that the Circuit Judge had no authority to accede to the request for a jury trial unless he should decide that the information was for murder in the first degree. In passing on the question as to whether or not the information was for murder in the first or second degree, or indeed whether it is a good information, it will be necessary to examine particularly the requirements and rules of criminal pleadings as laid down in the Canal Zone laws. Title 2, pages 168 to 172, undertakes to state just what is necessary as matters of pleading in criminal prosecution and it seems further that it undertakes to, and does, eliminate much of the technical proceedings which have always existed at common law, and to substitute in their stead a more modern system of criminal procedure. It provides that all informations shall contain: First; the title of the action and name of the court; second, the name of the party charged, and a statement of the acts constituting the offense, and adding that all this shall be done

in ordinary and concise language and in such a manner as to enable a person of common understanding to know what it contained.

The supreme test, according to our law, appears to be whether the crime charged is set forth in language sufficiently simple and explicit to enable a person of ordinary intelligence to understand just what he is being tried for. To show that this is a clear understanding of the law, we find on the subject of appeals to the Supreme Court, the following language:

After hearing the appeal, the Supreme Court must give judgment without regard to technical errors or defects or exceptions which do not affect the substantial rights of the parties. (Sec. 227, p. 200.)

In the case of the People *vs.* King, 27 Cal., 510, the Supreme Court of that State, in dealing with sections of its code identical with those above quoted, says:

Our criminal code was designed to work the same change in pleading and practice in criminal actions which is wrought by the civil code in civil actions. Both are fruits of the same progressive spirit which, in modern times, has endeavored at least to do away with the mere forms and technicalities of the common law which were productive of no good, and frequently brought the administration of justice into contempt by defeating its ends. Under the pretense of informing the defendant of the nature of the charge against which he was called upon to defend, it was necessary, at the ancient common law, to describe the means by which the homicide was committed, and the nature and extent of the wound and its precise locality, from which it necessarily followed that a trifling variance between the proof and the allegation frequently defeated a conviction, no matter how manifest the guilt of the defendant. It was a long time before judges and legislators discovered that this rule had nothing but the most flimsy pretext to support it. If the defendant is guilty he stands in need of no information to be derived from a perusal of the indictment as to the means used by him in committing the act or the manner in which it was done, for as to both his own knowledge is quite as reliable as any statements contained in the indictment. If not guilty the information could not aid in the preparation of his defense. A disposition to relax much of this ancient strictness in criminal proceedings has manifested itself in modern practice, and in harmony therewith the legislature of this State has substituted, in the place of the old, a new system of practice and pleading, which retains all the elements of the former so far as they are made necessary by a due regard for the substantial rights of a defendant, but discards all such elements as serve no good purpose, and only tend to embarrass and defeat the administration of justice. That system provides a few plain and simple rules by which to determine the sufficiency of the pleadings, and declares that such rules shall be the test. (Section 235.) Those rules are found in section 246, and in order to ascertain whether an indictment is sufficient or not, it is only necessary to interrogate it by the light of that section. The present indictment stands that test in every particular. 1. It is entitled in a court having authority to receive it. 2. It was found by a grand jury in a county in which that court was held. 3. It gives the name of the defendant. 4. It shows that the crime alleged was committed within the jurisdiction of the court. 5. It declares that the offense was committed at a time prior to that at which the indictment was

found. 6. It sets forth the act charged as the offense clearly and distinctly in ordinary and concise language, without repetition and in such manner that any person can know and understand therefrom what is intended; for it alleges that the defendant, stating his name—at a place named, and a time mentioned which was prior to the finding of the indictment, with malice aforethought, assaulted one James Duffy, and did cut and stab the said James Duffy, giving him a mortal wound of which he afterwards died on the same day, and therefore within a year and a day from the time when the mortal thrust was received, which is all that is necessary to constitute the offense of murder, and sufficiently identifies the act to guard the defendant against a second prosecution, and, as provided in the seventh and last subdivision of the section in question, states the same with sufficient certainty to enable the court to pronounce a judgment.

The first question to determine is, does the fact that the Prosecuting Attorney alleged that the murder was committed with malice aforethought make it murder in the first degree, notwithstanding modifications thereafter contained in the information?

The Canal Zone code referred to defines this offense as follows:

Murder is the unlawful killing of a human being with malice aforethought.

The question naturally suggests itself, does this definition of murder mean murder in the first degree only or does it mean murder in the first and second degrees? Following close on this we have section 148 which reads as follows:

Murder which is perpetrated by means of poisoning, lying in wait, etc., is murder in the first degree, and all other kinds of murders are in the second degree.

In other words, according to the code, and indeed this is common law learning, murder, both in the first and second degrees, contains much of the essential element of malice aforethought. It follows, therefore, that murder committed in a certain way and under certain circumstances *with malice aforethought* is murder in the first degree and that murder committed in a certain other way and under certain other circumstances *with malice aforethought* is murder in the second degree. The allegation made in the beginning of the information of malice aforethought would be sufficient to charge murder in the first degree if left standing alone; but when all the essential ingredients which are necessary to murder in the first degree are specifically negatived, then it either becomes murder in the second degree or the information is valueless. The question recurs, can an information be filed for murder in the second degree? This was argued extensively at the hearing and the counsel for the defendant admitted that under certain circumstances, such could be done. In every case where murder is

charged there are four things that can be done. The defendant may be convicted of murder in the first degree, of murder in the second degree, or of manslaughter, or, he may be acquitted. If an indictment can be sent against a man for manslaughter as no one seems to dispute, then it is but natural that it could be sent against him for either one of the other degrees of murder. Suppose in an affray a man is killed in a heat of passion, that there were no elements of murder in the first or second degree, can it be supposed that a prosecuting attorney, acting for the Government, could, upon his oath, file an information based on the testimony of witnesses, for murder in the first degree when he knew at the time he filed it that no such crime had been committed? If he was convinced that the facts warranted only a verdict of murder in the second degree how could he upon his oath, without doing violence to his conscience, file an information for murder in the first degree?

It will be noted from the above that the conclusions are reached that the information does not charge murder in the first degree, but that it does charge, and properly charges, the crime of murder in the second degree.

It is objected that the information is not as specific as to the place of death as it should be.

It charges that in the jurisdiction of the court of the third circuit the defendant shot and killed the deceased. There was no motion to make more specific, no objections taken, and no motion in arrest of judgment. At the trial this alleged omission was not regarded as important and no notice was taken of it. Under these circumstances how can it be said with any degree of sincerity that the defendant was prejudiced in any substantial right by the failure of the pleader to be more specific. The information, however, does charge that the death occurred in the third judicial circuit, and the evidence, that it was at Colon Hospital. There is no statement in the record to negative the fact that Colon Hospital is within the jurisdiction of the court of the Third Judicial Circuit, and yet we know as a matter of fact that it is not. At most it can only be said that there is a variance between the allegation and the proof. At the time when they should, the defendant took no advantage of this. If he had done so, an amendment could have been made, and the necessity avoided of coming to this court at all.

On this question we find in Cyc., page 848, under the authorities cited thereunder, the following:

It is in many jurisdictions stated to be necessary to allege both the time and place to the fact of death, the allegation of time being necessary to show whether death occurred within a year and a day, and the allegation of place to show that death occurred within the jurisdiction of the court, but under modern statutes, providing that the court having jurisdiction of the place where the mortal blow was struck may have jurisdiction of the offense without regard to the place of death, it is held in many instances that the averment of place of death is now unnecessary.

Applying the above, it will be found on examination that our code provides that if any material part of a crime is committed within the jurisdiction of the courts of the Canal Zone, even though the remainder is without the jurisdiction, the courts may prosecute and punish the offenders.

In the case of *People vs. Doland*, 9 Cal., 583, the court said:

We have held that the substantial facts necessary to constitute the crime charged must appear in the indictment with sufficient certainty to enable the court to pronounce a proper judgment and the party to defend against the charge, but it is not necessary that they should be stated with the particularity which was required at *common law*. It is sufficient if a man of ordinary intelligence can understand from the indictment that under such circumstances as show a felonious intent a mortal wound was inflicted upon the deceased, of which wound he died within a year and a day from its infliction.

It is hard to infer that the information in the case before us does not conform strictly to the above very plain and sensible rule. It is equally difficult to see that the defendant was prejudiced in any way by failure to state the place of death. In truth, the defendant went to trial, made his defense, was convicted, and appealed to the Supreme Court without even discovering the defect in the information which he now considers so very important and substantial.

In 126 Cal., 505, we find:

Where the evidence supports the verdict and proper instructions are given, and no exceptions taken to the admission of evidence, the error in procedure must be plainly shown to have been prejudicial to justify a reversal of the judgment or order denying a new trial.

And in *People vs. Sprague*, 53 Cal., 491, it is said:

On hearing an appeal this court will give judgment without regard to defects or errors, or to exceptions, which do not affect the substantial rights of the defendant.

It will be observed that the language of our code is even stronger than that of California above quoted.

The record may be searched, the evidence may be sifted, and there can be no conclusion that the defendant has suffered in any substantial right by virtue of any statement contained in, or the failure of any statement which should have been included in the information. The only reason assigned to show that he has suffered in any substantial right is the fact that a jury trial was not awarded him, and, irrespective of this alleged defect, such could not have been done, and would not have been done at the trial.

The writer is not insensible to the fact that there is a certain line of decisions which apparently challenge the views expressed above, but it will be found on close scrutiny that such is not in fact the case. In these decisions the common law doctrine, with all its absurd technicalities, was followed. In order to test the question properly it must be remembered that, on the adoption of the Criminal Code of Procedure of the Canal Zone, these rules and technicalities of the common law were abolished and new rules established in their stead, the principal one of which is that the crime against the defendant shall be stated in such ordinary and simple language as to place a man of ordinary intelligence on notice as to the charge against him.

When this has been done, the ends of the law, as well as justice, have been met. In the case before us the defendant could not have understood that he was being tried for any crime save and except that of slaying, with malice, the deceased, Harry Stern, in the Third Judicial Circuit, and that there was a want of that premeditation, etc., which reduced the crime to, and made it triable, as second degree murder. This is stated plainly and concisely in the information, and follows in that regard the strict letter, as well as the spirit, of our code.

It is believed that the information is in accord with law; that the defendant was properly tried by the judge of the Third Judicial Circuit under the law as it existed at the date of the trial; that the judge was powerless to award a trial by jury; that the point made in the Supreme Court with regard to the place of the death of the deceased is not tenable for the reasons stated; and that the judgment of the lower court should be affirmed.

Affirmed.

JACKSON, J. It is my opinion that the verdict and sentence of the court below should be set aside and a new trial granted for the following reasons:

First.—The information upon which Houston was tried was substantially defective in failing to aver the place of death of

Harry Stern. The information alleges that the defendant, J. Frank Houston, shot Harry Stern in the first circuit on the 8th day of February, 1913, and that he died 3 days afterwards on the eleventh day of February, 1913, but it nowhere alleges the place of death of Stern. The place of death is a necessary and substantial fact in an indictment or information for murder and therefore the information should have been quashed and the first and second grounds of the demurrer to the information should have been sustained. These grounds of the demurrer, it may be stated, were that the information did not substantially conform to the requirements of the penal code of the Canal Zone and that it did not state facts sufficient to constitute a public offense. They were, therefore, sufficiently broad to cover the defect in the information as to the essential allegation of the place of death.

Second.—The defendant should be granted a new trial because (overlooking the defect above named) he was charged with murder in the first degree, that is, the information charged that he did “with malice aforethought, unlawfully kill and murder one Harry Stern,” and it is conceded by all that the legal intendment and effect of these words is to charge murder in the first degree. Nevertheless, he was denied the right to a trial by jury and his written motion for a jury, filed April 24, 1913, was overruled, to which he duly excepted. The law in force at that time provided that the accused should be entitled to a trial by jury in all cases wherein “the penalty of death or imprisonment for life may be inflicted.” In my opinion the qualifying words of the information, that the shooting was done “under circumstances lacking that wilfulness, deliberation, or premeditation constituting murder in the first degree * * * and so the said J. Frank Houston in the manner and form aforesaid, did then and there commit the offense of murder in the second degree” did not change the legal effect of the information, but the defendant still continued charged with an offense wherein the penalty of death or imprisonment for life might have been inflicted.

As to the first proposition, the law seems too plain for argument, the precise question having been settled by the United States Supreme Court, which is the authority of all others that this court should follow, and by well-considered cases in California and Louisiana where the law and rules of practice in criminal cases are similar to those of the Canal Zone. In fact no authority of any court has been cited to sustain the proposition that it is not

necessary to allege the place of death in an indictment or information for murder. In *Ball vs. U. S.*, 35, Law edition of the U. S. Supreme Court Reports, page 377, decided in 1891, the court said:

All the essential ingredients of the offense charged must be stated in the indictment, embracing with reasonable certainty the particulars of time and place, that the accused may be enabled to prepare his defense and avail himself of his acquittal or conviction against any further prosecution for this same cause. Hence, even though this defendant may have been properly tried in the Eastern District of Texas, if the fatal stroke were inflicted there, though death occurred elsewhere, yet, nevertheless the averment of the place of death still remains essential.

As reasons for this rule the United States Supreme Court stated as follows:

First, that the defendant may be prepared for his defense; second, that the record may be a bar to a prosecution for the same offense, and third, that it should appear from the facts patent on the record that a distinct legally defined crime had been committed in order that the court may be justified in awarding judgment according to law. The defects in the indictment are not cured by verdict, but may be taken advantage of by motion in arrest of judgment.

So, in *People vs. Wallace*, 9 Cal., page 30, the court said:

The facts of time and place of death can not be inferred or ascertained by intendment; they must be precisely and distinctly stated.

In this California case the court went so far as to hold that the words "then and there died" are not a sufficient allegation of the place of death. In *State vs. Cummings*, 5 La. Ann., page 330, the court said:

The indictment does not set forth the place at which the deceased died, and it is moved to arrest the judgment on that ground. The place of death should have been alleged, first, to give jurisdiction to the court; for, although the mortal blow is given in one parish, and the death takes place in another, and the accused may be prosecuted in either, yet it must allege that the deceased died in one of the parishes.

Let it be stated that the reason for this rule does not apply here because as the deceased died of the wound in the Republic of Panama it is not contended that he could be tried for murder in Panama, but there are other reasons stated for the necessity of the allegation of the place of death that apply with force to this and all other jurisdictions. They are stated in the last named decision as follows:

Among the obvious reasons rendering it necessary to state the place of death, it is necessary to enable the accused to defend himself by showing, if

possible, that no death occurred at the place indicated, or that another person than the one to whom he gave the blow died there, or that the one to whom he gave the blow died from another cause.

It is further stated in the same case as follows:

Every writer upon pleadings in criminal cases states that the place of death, in a prosecution for homicide, must be stated. All the forms given in books of practice set forth the place of the death; and all the adjudicated cases, in which a question as to the necessity of stating the place of death in the indictment has been raised, require it to be stated.

The same decision further held:

Even where the mortal blow was given in one jurisdiction and the death occurred in another, the place of death must be stated.

In the United States *vs.* Cruikshank, 23 Law Ed., U. S., 588, it is stated:

That every ingredient of which an offense is composed must be accurately and clearly alleged in the indictment, or the indictment will be bad, and may be quashed on motion, or judgment may be arrested before sentence or reversed on writ of error.

Counsel for the Government combats the force of these decisions by referring to section 147, page 149 of the code with reference to demurrers in criminal proceedings to the effect that the demurrer must distinctly specify the grounds of objection to the information or it must be disregarded, but, as stated, the general demurrer that the information did not state facts constituting a public offense was broad enough to cover such a defect of substance as the failure to allege the place of death, and the United States Supreme Court has held, as we have shown, that such a fatal objection can be taken advantage of at any time either by motion to quash or in arrest of sentence or even, for the first time, on writ of error. It is further contended that this defect can not be reviewed because of the provisions of section 277, page 200 of the Laws of the Canal Zone, as follows:

After hearing the appeal, the Supreme Court must give judgment without regard to technical errors or defects, or to exceptions, which do not affect the substantial rights of the parties.

But this is not a technical error or defect. It is a defect of substance. It was argued that it was generally known that Stern died at the Colon Hospital in the Republic of Panama and therefore no substantial rights were affected. But if a defendant in a criminal, or even a civil, action is entitled to legal notice of a fact according to the forms of law, the failure in this respect is never

cured by the fact that he may have had independent knowledge of his own. A contrary rule would lead to unsatisfactory and dangerous results and make the administration of law depend upon extraneous facts instead of upon matters of record. Crude justice may be meted out by omitting *all legal forms* and requirements; and indeed without any judicial proceeding, but this is not what is meant by the section referred to in reference to technical errors. This section does not mean that facts essential to the validity of an information can be dispensed with and that the Supreme Court will regard as a technical error, a failure to allege an essential fact such as the murder itself, the time and place thereof, or the place of death.

In every information for murder heretofore filed in the Canal Zone, the allegation of the place of death had been recognized as an essential prerequisite. In the case of the Government *vs.* Blas Martinez, the information alleged that the deceased "did languish, and thus languishing did, at the hospital at Ancon, in said Canal Zone, and on the 23d day of December, A. D. 1907, there die." In the case of the Government *vs.* Ortega, the information alleged that the deceased "did languish, and so languishing, died of said mortal wound at the Ancon Hospital, Ancon, C. Z., on the 26th day of December, A. D. 1911." Why so essential an averment was omitted in the present case is difficult to understand but it must be said that the attempt to support the information without such averment rests upon fallacious argument and without the authority of any court. The case should be reversed for this manifest error.

Now, as to the defendant's right to a jury. In the first place it is doubtful, to say the least, if an information can be drawn for murder in the second degree so as to preclude the right of the tribunal trying the case to find a verdict of murder in the first degree. The Supreme Court of California had held that it could not be done, and our statutes are in all respects similar to the statutes of California. In *People vs. Nichol*, 34 Cal., page 217, the court said:

As we held in the case of *People vs. King*, 27 Cal., 507, it is not the province of the Grand Jury to determine the degree of murder. That duty is, by the statutes, expressly cast upon the trial jury, and the designation of the degree by the Grand Jury is, therefore, as idle as a recommendation to the mercy of the court appended to a verdict of guilty of murder in the first degree. If the Grand Jury undertakes to designate the degrees, such designation is to be disregarded. The jury may, notwithstanding, find the defendant guilty in the first degree, if, in their judgment, the testimony is sufficient.

Counsel for the Government combats the force of this decision by stating it rests upon the statutes of California, but I find our statutes in this respect to be in all respects similar to those of California. For instance, section 66, page 169, paragraph 2 of our code with reference to informations provides that it must contain "a statement of the acts constituting the offense, in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what it contained." This would seem to indicate that it is not the province of an information to charge the degree of murder but that the facts must be stated, and so broadly, that they will include all degrees of murder, leaving it to the trial tribunal to determine the degree; and this is further borne out in the provisions of section 205, page 189 of our code with reference to verdicts in felony cases, which provides as follows:

Whenever a crime is distinguished into degrees, a verdict of conviction must find the degree of the crime of which he is guilty.

Therefore, it would seem to follow that the fact that the Prosecuting Attorney gave it as his opinion, in the information, that the offense was murder in the second degree, did not, any the less, make it an offense wherein the accused might not have suffered the penalty of death or imprisonment for life and for which he would have been entitled to a jury.

But, if murder in the second degree could be so charged as to deprive an accused of a jury, it would seem to me it would have to be done by subtracting from the broad allegation of malice aforethought all of the elements of murder in the first degree specified in section 148, page 105 of our code. In the case of *People vs. Sanchez*, 24 Cal., page 17, the court said:

Murder in the second degree includes all kinds of murders which are murder at common law and not included in the definition of murder in the first degree.

Now, under section 148, page 105, of our code, murder in the first degree includes many things and is defined as follows:

Murder which is perpetrated by means of poison, lying in wait, torture, or by any other wilful, deliberate, or premeditated act or acts, or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary or mayhem, is murder of the first degree, and all other kinds of murder are of the second degree.

It will be noted that the information has very broadly charged the defendant with murder in the first degree, subtracting, or rather attempting to subtract, only one of the above-mentioned

elements therefrom. It merely says, "lacking that wilfulness, deliberation or premeditation constituting murder in the first degree." But to reduce it strictly to murder in the second degree it would seem to be necessary to go further and subtract the other elements that would make it murder in the first degree, such as attempts to commit arson, rape, robbery, burglary, or mayhem. Again, let it be noted that the information does not allege that the shooting was "without" wilfulness, deliberation or premeditation, but that it was "lacking" that wilfulness, deliberation or premeditation. In this respect the present case differs from the case of *Ward vs. State*, 96 Ala., page 100, where the words "without deliberation" were used and where the statutes of Alabama did not contain the other elements of murder in the first degree set forth in said section 148. "Lacking" a certain amount of wilfulness, etc., and "without" any wilfulness may be entirely different things and it is not the province of an information to say that it is lacking just so much as to make it murder in the second degree, which would deprive the accused of a jury. If any element of wilfulness, etc., remains it should be the province of the jury to determine whether it was sufficient to make it murder in the first degree, murder in the first degree with extenuating circumstances, murder in the second degree or manslaughter. In this respect the decision of the Supreme Court of California in the case of *People vs. Aro*, 6 Cal., page 207, is particularly in point as follows:

The necessity of a statement of the facts and circumstances constituting the offense still exists, and is directly recognized by the 237th section of the statute which provides that the indictment shall contain a statement of the acts constituting the offense. In this particular, at least, it may be safely said that our statute has not altered the common law, but no one, I apprehend, could maintain that under the old system of practice, either in England or the United States, the allegation of a legal conclusion has ever been held sufficient.

Therefore, it seems to me that the allegation in the information that it was murder in the second degree amounted to nothing more than the opinion of the prosecutor; and murder in the second degree can not be thus charged any more than murder in the first degree could be charged by merely calling it such. What is necessary is a statement of facts.

If it be said that these are technicalities raised by the defense and should not be considered, let it be remembered that a technicality of pleading, amounting to legal conclusion, forced the defendant to a trial without a jury, which resulted in a verdict of guilty of murder in the second degree for which he was sentenced

to 10 years' penal servitude in the penitentiary, and for which he could have been sentenced for any number of years; and that there is not a State or Territory in the Union or any civilized country in the world where he would have been denied a jury on such a charge. He was, therefore, by the use of a technicality (which was, in my judgment, insufficient for the purpose) deprived of a most substantial right, the right to trial by jury; and if by a technicality of pleading it is attempted to deprive a defendant of a jury trial, then I think such technicalities should be strictly construed. It is a poor rule that does not work both ways. In other words, I do not think courts should look with favor upon technicalities that go to deprive one accused of murder of a jury trial, and at the same time look with disfavor upon objections thereto because the objections may be somewhat technical. All this is entirely aside from the fact that the defendant was found guilty by a single judge, and sentenced to 10 years' penal servitude for shooting the destroyer of his home, under circumstances that would probably have resulted in his acquittal by any jury in any State of the Union.

Realizing this, the suggestion of executive clemency has been made, but it is not a case of clemency. It is a case where the defendant is entitled by law to a new trial for insufficiency of the information, and also because he was legally entitled to a jury. For the reasons stated I, therefore, dissent from the opinion and judgment of affirmance herein.

CODRINGTON *versus* McCLINTIC-MARSHALL CON-
STRUCTION COMPANY.

No. 120. Argued September 24, 1913. Decided November 18, 1913.

ASSUMPTION OF RISK.

One who is ordered to ascend a scaffold in the course of his employment, upon the collapsing thereof, immediately after his ascent, is not precluded from recovery in a suit against the employer for damages for personal injuries upon the theory of assumption of risk.

NEGLIGENCE. FELLOW SERVANT.

A master is not relieved from liability for damage to his servant caused by an improperly constructed scaffold upon the ground that the same was erected by fellow servants of the one injured.

Appeal from the Circuit Court of the First Judicial Circuit;
Hon. H. A. Gudger, Judge.

The facts appear in the opinion.

Oscar Teran, for appellant. *V. E. Bruno*, for appellee.

JACKSON, J. On May 5, 1913, the Circuit Court in and for the First Judicial Circuit rendered judgment in favor of the plaintiff and against the defendant in the sum of \$1,500, on account of personal injuries sustained by the plaintiff which were alleged to have resulted from the negligence and carelessness of the defendant. A motion for a new trial was filed for the following reasons:

First. Because the judgment is against the evidence and manifestly against the weight of the evidence.

Second. Because the judgment is against the law.

These grounds constituted the only claim of error herein. The motion was overruled, exception noted, and the case is before this court on the defendant's bill of exceptions. It may be here remarked that the bill of exceptions presents a very meager and unsatisfactory account of the evidence adduced at the trial in the court below.

Plaintiff's allegation of negligence is set forth in paragraphs 4 and 5 of the complaint, as follows:

4. That while plaintiff was so employed, to wit, on the 11th of August, 1912, standing on a suspended scaffold about 35 or 40 feet in the air, driving rivets, the scaffold, through the carelessness and negligence of the defendant company, gave way, precipitating plaintiff violently on some iron castings at the base of the gate below with the result that plaintiff's right leg was fractured at the knee, his left hand broken at the wrist, and sustained several contusions about the arms and chest, and was unconscious for upwards of an hour. Plaintiff at the time of said injury was acting with all due care, diligence, and caution and in obedience to orders, and did not contribute in any way to the said injury.

5. Plaintiff further avers that the injury was due entirely to the negligence of the defendant company.

The defendant's answer consisted of a general denial and also the affirmative allegation that the plaintiff had been skilled in the particular work he was performing at the time and was familiar with its hazards, as to which he had been instructed by the defendant's agent or foreman. The answer further alleged in paragraph 3 thereof, as follows:

The scaffold and plank, hereinbefore referred to, were at the time sound and in good working order, and the fall was only due to the plaintiff's own con-

tributory negligence, and to the negligence of the fellow workmen of plaintiff in the particular work.

At the trial of the case the plaintiff's contention, as supported by his own testimony and that of one Charles Carney, a straw boss working for the defendant, and John H. Yeck, a rivet inspector for the Isthmian Canal Commission at the locks in question, tended to show that on August 17, 1912, the plaintiff, under the direction of a Mr. Cole, the foreman and agent of the defendant company, was sent to do riveting work on a scaffold from 35 to 40 feet high and that it was the first time the plaintiff had been on the scaffold since its construction and that a very few minutes after he commenced working, the scaffold suddenly gave way and he fell on some iron castings below, sustaining painful and permanent injuries of which he complains; and that the scaffold fell because the end of the plank upon which the plaintiff was at work should have been bolted to make the scaffold secure and safe; that there was a hole bored to receive the bolt but that there was no bolt; that the scaffold fell because no bolt held it; that the plaintiff was performing his work in a regular manner and did nothing through any negligence on his part to contribute to the fall of the scaffold. The testimony of John H. Yeck, rivet inspector for the Isthmian Canal Commission was to the effect that he saw the scaffold in question on the morning of August 17, 1912, that there was no bolt to hold the same fast although a hole was bored to receive one and that he called the foreman's attention to the scaffold and that he examined the scaffold immediately after he saw there was no bolt; and that he remonstrated with the foreman of the defendant company for the neglect.

The testimony of H. C. Edwards and one Foster on behalf of the defendant company tended to show that the plaintiff had worked as a riveter for some time, that he was instructed in the work that he was to perform, and that he had the scaffold under his control; that all employees were similarly placed under notice, including the plaintiff, that they must see to any defects or deficiencies in the scaffolds upon which they worked. However, the defendant's witness, Edwards, stated on cross-examination, that there were regular rigging gangs under a rigging foreman and that it was the duty of the rigging gangs to erect scaffolds upon which the men were called upon to work.

From the undisputed evidence in the case, it must therefore be conceded that the plaintiff sustained the injuries by reason of

negligence in failing to properly secure the scaffold upon which he was sent to work and the questions presented are:

First. Was the injury the result of an ordinary risk or hazard of the employment which the plaintiff assumed?

Second. Was the negligence that of a fellow servant of the plaintiff?

It is argued by the defendant-appellant, in support of the first proposition that the injury resulted from dangers caused by the progress of the work or from the negligent use of safe appliances by the plaintiff himself. In other words, that it was the result of the negligent performance of a detail of the work itself as it arose from time to time during the progress thereof and that it was the duty of the plaintiff to exercise care in this regard for his own safety, and that the failure to exercise such care either by the plaintiff or his fellow servants engaged with him, did not render the defendant liable for an injury resulting therefrom. But the objection to this argument is apparent from the proven facts of the bill of exceptions that the plaintiff was ordered to ascend a scaffold 35 or 40 feet high, that he could not reasonably be expected to see any defects about the scaffold at this distance therefrom or indeed until he ascended to it, and that the scaffold fell a very few minutes after he had begun work upon it. Therefore, admitting the defendant's general proposition of law to be sound in all respects, the facts shown do not bring the case at bar within the rule, in fact the evidence seems to show conclusively that it was not a defect or deficiency caused by the progress of the work, nor a detail of the work as it arose from time to time.

The other contention of the defendant appellant is that even if it be admitted that the scaffold as originally constructed was faulty and that there was negligence in this respect so that the plaintiff was injured almost immediately upon his beginning work thereon, nevertheless, the negligence in and about the construction of the scaffold was that of the fellow servant of the plaintiff, for which the defendant is not legally liable. Although counsel for the defendant-appellant in his oral argument and in his very able and learned brief, filed herein, supports this proposition of law by the citation of many apparently well-considered cases, we can not recognize this as a sound principle of law, applicable to the case at bar. We understand the law to be that it is the duty of the master to furnish the employee a safe place to work and that this work can not be delegated to a servant or employee so as to enable the master to escape liability for the negligence of

the servant on the ground that the injured servant and the negligent servant were fellow servants. In *Bailey on Personal Injuries*, section 538, page 1510, it is said:

So it is generally held that the duty to keep the place of work safe can not be delegated to inspectors and repairmen so as to relieve the master from liability, but that he is liable for the negligence of such inspectors or repairers.

In *Pantzer vs. Tilly-Foster Mining Company*, 99 N. Y., 368, it was held:

A master must exercise reasonable care to provide for his servant suitable tools and implements, a proper place to work in, competent fellow workmen when needed, and he can not delegate the performance of these duties to a superintendent or other employee so as to exonerate himself from liability to a servant who has been injured by their nonperformance.

In *Parker vs. Fairbanks Mfg.*, 130 Wis., page 525, it was held:

That a scaffold erected by the master's carpenters for the use of bricklayers was a place of work, and where it fell from being improperly constructed, injuring one of such bricklayers, the master was held liable.

And in *Thomson-Sterrett Company, vs. Fitzgerald*, 79 U. S. Circuit Court of Appeals, it was held:

That if the building of staging for scaffold is not within the duty of a servant who may have to use them in doing his work, or if he has no hand in erecting them he is not a fellow servant of those servants to whom such duty has been assigned, and may recover for injuries sustained by reason of improper construction.

In *Hunting vs. Quarterman*, 120 Ga., page 344, we have the same principle announced. In fact this is the sound exposition of the law as we understand it and although there are authorities and statements in text books to the contrary, it must be remembered that the trend of modern legislation, both national and state, and the trend of modern decisions in the Federal and State courts of our country and also in England is for limiting the defense of fellow servant, assumed risks of an employee and contributory negligence have been carried too far; and that in many instances they do not rest upon sound reason or logic; the original conditions calling for the application of these defenses having to a large degree ceased to exist in the more modern ideas of the relations between the master and servant. Therefore, if we should hold in the present case, that the negligence of a rigging gang in and about the erection of the scaffold was the negligence of a fellow servant as applied to one called to work upon said scaffold who

ad no part in the erection thereof, we think it would be taking a step backward rather than a step forward and not in keeping with the trend of modern ideas and modern decisions.

It follows that the decision of the court below must be affirmed, with all costs to the plaintiff-appellee.

Affirmed.

DRISCOLL *versus* KENNEY.

No. 121. Argued December 9, 1913. Decided March 10, 1914.

SLANDER. DAMAGES.

Special damages need not be proved by a plaintiff in an action for slander in order to obtain a judgment for nominal damages for the use of words which impute the commission of a crime involving moral turpitude.

MITIGATION OF DAMAGES. PLEADING APOLOGY.

The pleading of an apology by way of defense in an action for slander may be considered by the court in mitigation of damages.

Appeal from the Circuit Court of the Second Judicial Circuit:
Hon. William H. Jackson, Judge.

The facts appear in the opinion.

W. H. Carrington, for appellant. *Hinckley and Ganson*, for appellee.

GUDGER, C., J. This action was tried in the Second Judicial Circuit, and from the judgment entered the plaintiff appealed.

The complaint sets forth two causes of action. The first is denied by the defendant, and the evidence introduced at the trial was of a conflicting nature, and the finding of the court is conclusive. The second cause, and the one relied on in this court, charges in substance that on a certain night during the month of December, 1912, the female defendant, referring to the female plaintiff, called her a murderess. The answer to this charge is indefinite, it appearing in part to admit and in another part to deny the use of the language.

The plaintiff and her witness gave testimony to the effect that defendant used the language as set forth. The defendant in her own behalf took the stand, and, among other things, was asked by her attorney the following question: "Did you call her a

murderess," to which she replied: "I said I would not lie in bed with a murderess." The judge propounded the following question: "You meant this abortion"? Answer, "yes."

A statement had appeared in the testimony of this witness that the plaintiff had at some time prior to that date had an abortion, and that to this her language had reference when she used the term "murderess." There was no evidence at the trial to prove that the plaintiff had caused the abortion mentioned.

To charge a person with this act is a felony in the Canal Zone, and would, if true, subject the person so charged to punishment. See Laws of the Canal Zone, page 114, chapter 3, section 212.

The question to be examined and determined is, does a charge of this nature carry with it damages *per se*? The judge seems to have taken the position that, unless special damages were proved, none could be assessed. If these words had been merely derogatory or disparaging then it would have been essential to show special damage. In a case, however, where the crime charged is one carrying with it moral turpitude the rule is otherwise:

One of the best settled rules of the law of libel and slander is that oral words imputing to another the commission of a crime involving moral turpitude, or which would subject the offender to an infamous punishment, are actionable without proof of special damages.

The defense set up in the answer can not be considered as a justification, but, at most, only as mitigation. The answer undertakes to negative malice and states that at the time when the words were uttered the defendant was laboring under great mental strain; that she did not then, and does not now, regard the plaintiff as unchaste; that she used the words in a moment of great excitement; that she was provoked; and that she offers the plaintiff an apology for the words which were spoken by her in such haste; and, in addition to this, she avers that the plaintiff, by virtue of the charge made, suffered no damage.

The court seems to have confused the plea of mitigation with that of defense, and in this there was error. The law in such a case fixes, and properly so, at least nominal damages.

In view of the fact, however, that the defendant was laboring under such mental strain; that she was irritated by the conduct and words of the plaintiff; and that in the answer there was a complete and full apology; that the judge who tried the case felt that no particular damage was done to the plaintiff's character; we think the case should be disposed of without further

delay and, therefore, we order that the case be remanded to the court of the Second Judicial Circuit, and that the judgment below be reversed, and a judgment entered in favor of the plaintiff for the sum of one cent.

Reversed and remanded.

YCAZA *versus* THE AFRICAN CONSTRUCTION COMPANY
and OBARRIO.

No. 122. Argued October 27, 1913. Decided March 30, 1914.

REVINDICATION. EJECTMENT.

In an action for revindication or ejectment, if the plaintiff fails to prove that the property claimed by the defendant lies within the boundaries of lands to which he asserts title in the action, judgment should be entered for the defendant.

Appeal from the Circuit Court of the First Judicial Circuit:
Hon. H. A. Gudger, Judge.

The facts appear in the opinion.

Hinckley and *Ganson*, for appellant, African Construction Company. *Harmodio Arias*, for appellant, Nicanor A. de Obarrio. *Oscar Teran*, for appellee.

BROWN, J. This is an appeal from the judgment of the Circuit Court of the First Judicial Circuit. The respondents, plaintiffs in the court below, allege in their complaint that they are the owners of certain lands situated in the Canal Zone, known as "Campo Alegre" and specifically described in the complaint. The complaint sets forth certain instruments duly recorded which, it is alleged, operate to vest in the plaintiffs the legal title to the said premises. It is also alleged that the plaintiffs and their predecessors have been in open and notorious possession of "Campo Alegre" for more than thirty years. By the ninth, tenth, eleventh, and twelfth paragraphs of their complaint the plaintiffs alleged that the defendant (now appellant), the African Construction Company, claimed title to a certain portion of said "Campo Alegre" by virtue of various instruments alleged in the complaint to be fraudulent and that the said defendant had taken possession of said portion of the premises and

was erecting buildings and installing machinery thereon. The portion of the premises so alleged to be occupied by the defendant, the African Construction Company, is called "El Valle" in the complaint and is specifically described and bounded therein.

The plaintiffs prayed for a decree of the court, confirming in them the title to the whole of said "Campo Alegre," declaring null and void the instruments under which the African Construction Company claimed title to "El Valle," and enjoining the said construction company and all other persons from interfering with the peaceful enjoyment by the plaintiffs of their rights as owners of Campo Alegre.

The defendant, the African Construction Company, by its answer, denied all the allegations of the complaint and affirmatively alleged that it is the owner of "El Valle," describing said "El Valle" by substantially the same descriptions as that by which said "El Valle" is described in the complaint. Said defendant's answer further specifically alleged that the plaintiffs were not the owners of "El Valle" and alleged that same had been conveyed to the defendant company by the intervener by an instrument duly recorded.

The trial court denied the defendant's motion to dismiss which was made at the close of the plaintiffs' case and to such denial, exception was entered by the defendants.

In its decree, the trial court adjudged that the plaintiffs recover from the defendant, the African Construction Company, the premises claimed to be occupied by such defendant and decreed that the said defendant should, within 90 days from the date of the decree, remove from said premises the structures and machinery erected by it and recover nothing for said improvements. From the trial court's decree, the defendants appeal to this court.

The appellants in their brief argue a number of questions of law with respect to which it is urged that the trial court erred. We think, however, that it is necessary to discuss only one of the assignments of error in order to dispose of this appeal.

At the close of the plaintiffs' case, the defendants moved that the complaint be dismissed and we are of the opinion that this motion should have been granted.

On the pleadings two fundamental questions arose for the determination of the trial court, viz:

1. Had the plaintiffs legal title to the premises known as "Campo Alegre"?

2. Was the defendant, the African Construction Company, in unlawful possession of a portion of said premises?

It is plain, it seems to us, that if the plaintiffs' evidence failed to sustain an affirmative answer to either of these questions, then it was the duty of the trial court to dismiss the complaint for the reason that the plaintiffs failed to prove a *prima facie* case.

It was squarely in issue, under the pleadings, whether or not the plot called "El Valle" is a portion of the premises known as "Campo Alegre." If it is not proved so to be, then, even though the plaintiffs establish a perfect legal or equitable title, or both, to "Campo Alegre," still the plaintiffs would have shown no cause for any sort of legal or equitable relief against the defendants.

The mere allegation in the complaint that "El Valle" is a part of "Campo Alegre" does not help the plaintiffs' case in this respect for the defendant's general denial covers that allegation as well as all others. Nor does the fact that the description of "El Valle," contained in both complaint and answer are substantially identical show in any way the relations, if any exist, between "Campo Alegre" and "El Valle." The question whether or not the land described in the pleadings and called "El Valle" is embraced within the boundaries of "Campo Alegre" is purely a question of fact to be answered only by evidence. No maps were introduced; no comparison of lines or boundaries was made; no witnesses testified on this subject so far as our examination of the record discloses.

In fact we do not discover in the record any substantial evidence on which to predicate a finding that "El Valle" is wholly or partly within the boundaries of "Campo Alegre." And while we presume that the trial judge's long familiarity with the lands within the First Circuit may have supplied him with a knowledge of conditions and locations which would sustain the plaintiffs' contention with respect to identity of the land called "El Valle" with a portion of the estate called "Campo Alegre" still we think that such location and identity should have been proved before the defendants were put upon their defense.

In view of the foregoing we do not think it necessary to enter upon a discussion of the validity of the plaintiffs' title as the same is disclosed in the record.

The judgment of the court below is reversed and the complaint dismissed without prejudice to such new proceedings or action as the plaintiffs may be advised to institute.

Reversed.

CANAL ZONE *versus* KERR.

No. 123. Argued October 20, 1913. Decided November 18, 1913.

NEW TRIAL. NEWLY DISCOVERED EVIDENCE.

A motion for a new trial on the ground of newly discovered evidence will not be granted unless the affidavit in support of said motion clearly states facts showing that the moving party could not have procured the testimony desired to be introduced by the exercise of reasonable diligence.

PERJURY. CORPUS DELICTI.

Unless the evidence, in a criminal action for perjury, discloses the testimony of one witness directly to the *corpus delicti*, together with sufficient corroborating evidence, a conviction should not be had.

Appeal from the Circuit Court of the Second Judicial Circuit;
Hon. H. A. Gudger, Judge.

The facts appear in the opinion.

Hinckley and *Ganson*, for appellant. *Charles R. Williams*, for appellee.

BROWN, J. The appellant was tried in the Second Circuit Court on the charge of perjury, was found guilty and sentenced to serve a term of one year in the penitentiary. Thereafter the appellant, defendant below, made the usual motion for a new trial on the ground that the verdict was contrary to the law and the evidence and thereafter filed his motion for a new trial on the ground of newly discovered evidence. Each of these motions for a new trial was in turn denied by the Chief Justice who had presided at the trial as Acting Circuit Judge of the Second Judicial Circuit. The defendant thereupon appealed to this court.

To discuss this case from our point of view it is necessary to state the facts in some detail.

During the year 1910, and theretofore, the defendant was doing business in Colon, Republic of Panama, and at Las Cascadas, Canal Zone, as a jeweler. On October 7, 1910, one B. J. Burgoon began an action in the Second Circuit Court against the defendant, Kerr. In his complaint the plaintiff in said action alleged that he and the defendant were copartners doing business at Colon and Las Cascadas under the firm name and style of J. L. Kerr. The complaint prayed for an accounting and the appointment of a receiver of the assets of the firm. The defend-

ant's answer denied the partnership. The case came on for trial and the trial court held that a partnership existed between the parties and appointed one Ross H. Reed as receiver.

Subsequently one M. J. Averbeck, of New York, claiming to be a creditor of Kerr, or of the partnership conducted under the name of J. L. Kerr, sued the receiver to recover the sum of \$1,469.36 which he alleged was the balance due upon an account for goods sold and delivered. The answer filed by the receiver denied that there was any indebtedness or any balance due and alleged that the same had been paid by Kerr. For the purpose of taking the testimony of Averbeck and his bookkeeper, one Asher H. Green, a commission was issued with interrogatories and cross-interrogatories and mailed to a commissioner in New York. In answer to these interrogatories Averbeck, and Green, his bookkeeper, both stated that at all times since Averbeck had transacted business with Kerr an open account with the latter had been kept on Averbeck's books and that no credit of any kind had been made by Kerr since the 25th day of July, 1910. Averbeck stated that there were no outstanding or existing set offs or counterclaims in favor of the receiver, of B. J. Burgoon, or of J. L. Kerr, or any of them, jointly or severally, against said amount of \$1,469.36.

At the trial of the action of Averbeck *vs.* Reed, receiver, the defendant, appellant in the case now before this court, was introduced as a witness on behalf of Averbeck and upon oath testified in substance as follows: That the balance of account sued upon by Averbeck was wholly unpaid, and that there had been no credits upon the account of Averbeck against Kerr or Kerr and Burgoon subsequent to July 25, 1910.

The trial court rendered judgment against the receiver for \$1,469.36, less certain deductions which have no importance in the case now before the court.

The judgment against the receiver consumed all the assets of the partnership within the Canal Zone.

Subsequently Burgoon commenced an action against Kerr in the courts of the Republic of Panama and a liquidator was appointed in that action to take charge of the business of J. L. Kerr in the city of Colon. The liquidator demanded from Kerr's attorney all the papers pertaining to the business and during the absence of Kerr in Europe, Mrs. Kerr, his wife, turned over such papers to Kerr's attorney who in turn delivered them to the liquidator. Among such papers were found a draft and a receipt

which constitute the main evidence upon which Kerr, the defendant-appellant, was prosecuted for perjury in the case now under consideration.

The first of these documents is a draft drawn by M. J. Averbeck on J. L. Kerr for \$150, bearing date of August 9, 1910, accepted by Burgoon on August 26, 1910, payable August 29, 1910, and paid by Kerr's wife October 12, 1910.

The second document is a receipt reading as follows:

October 27, 1910. Received of J. L. Kerr on account \$500. Thanks.
(Signed) M. J. AVERBECK.

These papers were brought to the attention of Burgoon and the prosecution of the case now on appeal was initiated.

The information contains all necessary allegations with reference to the alleged perjury of the defendant-appellant which is in substance that when under oath as a witness in the case of *Averbeck vs. Reed*, hereinbefore referred to, the defendant contrary to said oath had stated that "no payments had been made upon the account of the said Averbeck since July 25, 1910, whereas in truth and fact, as the said J. L. Kerr then and there well knew, two payments had been made thereupon subsequent to July 25, 1910, to wit: One hundred and fifty dollars on the 12th day of October, 1910, and \$500 on the 27th day of October, 1910."

Upon the trial of the defendant for the alleged perjury the necessary facts of his oath and testimony as a witness in the *Averbeck* case were proved and the two documents above referred to were introduced in evidence. Burgoon testified that during the defendant-appellant's absence in the United States he, Burgoon, accepted the draft already referred to, in the name of J. L. Kerr. Burgoon also testified that there was only one open account existing between Averbeck and Kerr, and that that was the account referred to in the action of *Averbeck vs. Reed*.

The defendant-appellant testified in his own defense that sometime before the partnership action between Burgoon and himself was begun he was aware there would be trouble between himself and Burgoon, and that while in New York, about September 1, 1910, on the advice of counsel, he made certain arrangements with Averbeck by which no money was to be paid by Kerr as a credit or payment upon the open account afterwards sued upon by Averbeck, but that all sums of money paid by him to Averbeck should stand with the latter as a "bond" to guarantee the payment of the open account.

It was testified in substance that Averbeck had stated to Kerr that no further credit would be extended to the latter until some arrangement had been made to secure the former and that the sums of \$150 and \$500 referred to in the evidence were paid to Averbeck on account of such "bond" and that such sums were not paid on the open account. This agreement was stated to have been entered into in order that Kerr might obtain from Averbeck merchandise necessary to the conduct of his individual business. It appears also in the evidence that although the draft for \$150 was accepted by Burgoon August 26, 1910, payable August 29, 1910, at which time Kerr was in the United States, it was not as a matter of fact paid until October 12, 1910, which was 5 days after the commencement of the partnership action of Burgoon against Kerr. Mrs. Kerr testified that the draft was paid by her out of money which was hers before her marriage, and that the \$500 payment shown by the receipt dated October 27, was paid by checks drawn on a Pennsylvania bank and borrowed from a Mrs. Burrowes of Las Cascadas. Kerr also testified that he had consulted Messrs. Hinckley and Ganson, attorneys, and that they had advised him that if he paid money out of his own personal funds to satisfy a copartnership obligation he would not be able to collect such amount, and that he was therefore allowing the partnership to pay its own bills. Kerr testified that he made his "bond" arrangement with Averbeck in pursuance of the advice of Messrs. Hinckley and Ganson and that he had made a similar arrangement with other creditors, among them one Wood.

Mr. Hinckley, a member of the firm of Hinckley and Ganson, testified in substance that Kerr had consulted him before the latter went to the United States in the summer of 1910, and that he had then advised Kerr in the manner set forth in Kerr's testimony.

There is also found in the evidence a letter addressed by Averbeck to Kerr which was written in reply to a written request of Kerr's stating that there had arisen a dispute about the application of the \$150 and \$500 items and asking that Averbeck "explain just what the money covered." Averbeck's letter in reply to this request says that "both the above-mentioned amounts (i. e., the \$150 and \$500 items) were paid me by you as a 'bond' against \$1,469.36 due me by you as of September the first, 1910, but not as a payment on the same."

In our consideration of this appeal we shall discuss three only of the appellant's assignments of error, viz:

(1) That the trial court erred in denying the motion for a new trial on the ground of newly discovered evidence.

(2) That the judgment of conviction was contrary to the evidence and the weight of evidence.

(3) That the judgment was contrary to law.

(1) Appellant's application for a new trial on the ground of newly discovered evidence is based upon an affidavit made by one Hillyer. It alleged in substance that Hillyer was the export manager for the Waltham Watch Company; that he was familiar with negotiations entered into by and between Kerr and the watch company in September, 1910; that an arrangement was made between them to such an effect that thereafter all sums paid by Kerr to the watch company were paid as a "bond" against any amount then due and owing by Kerr to the watch company and were not credited on account as whole or part payment of any sum then due; that such arrangement was entered into as a result of the fact that Kerr contemplated certain difficulties with one B. J. Burgoon.

The evidence set forth in Hillyer's affidavit would, in our opinion, have been admissible had it been offered at the trial, for it would at least have thrown some light on the methods Kerr was using at the time with reference to payments made to his various creditors, and might have given rise to the corroborative inference that his method with other creditors was the method adopted between him and Averbeck. But the evidence was offered too late. A fundamental requirement in motions for a new trial on the ground of newly discovered evidence is that it must appear to the satisfaction of the court that the evidence could not have been discovered by the use of diligence. It is alleged in the affidavit that Kerr himself had made the arrangement with the Waltham Watch Company. He must therefore have known of its existence before the trial. It does not appear that Hillyer was the only person connected with the watch company cognizant of the alleged facts and the appellant, therefore, by diligent use of the means provided by law could have secured for use at his trial proper depositions respecting such facts. He could not now complain, therefore, if his own lack of diligence deprived him of whatever value the alleged new evidence might have added to his defense.

(2) It is apparent that the evidence in this case might be susceptible of differing views regarding its weight in respect to the question of the defendant's guilt. Ordinarily, however, it is not the province of an appellate court to determine the weight of evidence. As has been said by many appellate courts, including this court, it is the province of the trial court to pass upon questions which are purely questions of fact and to determine the probative weight of the evidence. And in a case which involved only questions of fact this court would not interfere with the judgment of the trial court if there appeared in the record sufficient evidence to sustain the verdict. Indeed, it should be said that the Code of Criminal Procedure provides that one convicted in a Circuit Court for a felony may appeal to the Supreme Court on questions of law alone. In the case now under consideration, however, the question whether the evidence is sufficient in quality and quantity to justify the verdict is distinctly a question of law. And we are therefore brought to a consideration of the appellant's third assignment of error.

(3) The crime of perjury may be defined as the corrupt assertion of a falsehood, when under oath on affirmation by legal authority, for the purpose of influencing the course of law. (Wharton's Criminal Law, Eleventh Edition, sec. 1508.)

The Penal Code of the Canal Zone (section 104) provides as follows:

Every person who, having taken an oath that he will testify, declare, depose or certify truly before any competent tribunal, officer, or person in any of the cases in which such an oath may by law be administered, wilfully and contrary to such oath, states as true any material matter which he knows to be false, is guilty of perjury.

The crime so defined is one of the most serious known to the criminal law. It may jeopardize person, property, and even life. When committed in a judicial proceeding it obstructs the course of law, strikes a blow at good order, and pollutes the stream of justice at its source. It is hard enough, as was ably and aptly said by counsel for the government when arguing this case, for courts to administer justice between man and man when dealing with real facts; it is a difficult task to interpret rightly the meaning of veracious evidence, but it is impossible for courts to do justice when the facts of a case are perverted by the wilful and corrupt falsifications of a perjurer. As a result of its possible effects, therefore, very early in the history of our English and American law perjury came to be regarded as one of the great

unnatural crimes which belonged to a class so heinous that one convicted of it was rendered only worthy of the contempt and loathing of all good men. And in order to convict of this great and loathsome crime more and stronger evidence was required than was required to convict of most other crimes. The same sort of a rule of evidence was applied as is applied to-day in respect to the crime of treason in those American jurisdictions in which it is provided by express statute that no conviction can be had on a charge of treason unless the accused confess in open court or two credible witnesses testify directly to the same overt act laid in the indictment. And so it came to be the rule of the common law that no one accused of perjury could be convicted except upon the evidence of at least two credible witnesses, testifying directly to the *corpus delicti*. The common law writers seeking a reason for this rule of evidence found such reason in the theory that as the alleged corruptly false statements were made by defendants when bound by the solemn obligation of their oath, the direct testimony of one living witness was necessary to counterbalance the defendant's oath, while the direct testimony of the other necessary living witness was required to overcome that presumption of innocence with which the common law clothed every person brought into a court of justice charged with the commission of a crime. The rule of evidence so stated was transplanted to the English speaking portions of North America. In the course of time, however, it has come to be the view of most of the courts of the United States, that while the direct evidence of a living witness is necessary to counterbalance the defendant's oath there is no good reason in common sense or logic why there should be any different rule in regard to the sort of evidence necessary to overcome the presumption of innocence in the case of one accused of perjury than in the case of one accused of any other crime. It is, therefore, now the general rule in most of the States of the United States, in some of the States by statute and in others by judicial interpretation of the practice and custom of courts, that there is not sufficient evidence to sustain a conviction of perjury unless there be in the evidence the testimony of one living witness testifying directly to the falsity of the matter alleged to have been corruptly and falsely sworn to by defendant which testimony must be corroborated by either the testimony of another living witness or by sufficient corroborating circumstances. The rule has been stated by Bishop in his New Criminal Procedure as follows:

A peculiarity in this offense relates to the number and corroboration of witnesses:

The doctrine is that, since the testimony alleged to be perjured was delivered on oath, such oath as well as that of the contradicting witnesses should be regarded on the trial for the perjury. And where the evidence, thus viewed, presents "only oath against oath," it will be insufficient. Whence it became the old rule that two witnesses directly contradicting what the defendant testified to, are indispensable to a conviction for perjury.

But—

Present rule.—Evidently where there is only one witness directly to the alleged falsity of the swearing, there may be something in the case, or brought forward by a witness who can not speak to the main charge, indicating, with reliable distinctness, which of the two contradictory oaths be false. Hence by the modern rule it is sufficient either that there are two witnesses, or that the testimony of the one witness is corroborated or sustained by other facts appearing in the case or testified to by other witnesses.

(Bishop's New Criminal Procedure, 4th edition, volume 2, section 927.)

Mr. Underhill in his book on Criminal Evidence says:

According to the earlier cases no conviction of perjury could be had unless the falsity of the evidence given under oath was proved by the direct evidence of two credible witnesses, the evidence of the second witness being required to overcome the presumption of innocence which the law indulged in favor of the accused. Such is not now the law. The accused may be convicted on the evidence of one witness, which, however, must in all cases be corroborated. The corroboration by circumstances must be strong, though it need not be equivalent or tantamount to another witness. But it must be clear and positive and so strong that, with the evidence of the witness who testifies directly to the falsity of the defendant's testimony, it will convince the jury beyond a reasonable doubt.

(Underhill on Criminal Evidence, second edition, section 468.)

We are of the opinion that the foregoing quotations correctly state the general rule of evidence which prevails in the various jurisdictions of the United States. Our investigation has led us to the examination of many authorities and cases pertinent to the subject under discussion and they all point to the one rule as to proof of the *corpus delicti*. We think it would be difficult to discover any authority which upon analysis sustains any other rule. The few cases which may seem on their face to sustain a different rule are cases in which the false statement charged was of such an unusual character that it was held that the evidence offered by the government amounted to testimony of the same quality and quantity as that required by the rule as stated.

A leading case on the subject is that of the State *vs.* Courtwright (66 Ohio State, 35). In that case the defendant had been

convicted of perjury, the judgment had been reversed by the Circuit Court and an appeal from such reversal carried by the State to the Supreme Court. The Supreme Court of Ohio, affirming the judgment of the Circuit Court, discussed at length the peculiar and unusual characteristics of the crime of perjury, the difficulties attending proof of the crime, and the limitations which ought to be placed upon a prosecution because of the unusual, peculiar elements of the crime, and then said:

Therefore, we consider that, when one is charged with the grave crime of perjury, it is but a just safeguard that more than purely circumstantial evidence shall be adduced to establish the *corpus delicti*; and we hold it to be the general rule that the falsity of the matter assigned as perjury must be testified to by at least one witness, and that he be corroborated by another witness or by facts and circumstances which will operate as a sufficient corroboration.

Counsel for the Government in the case now before us insists that the rule of evidence requiring one living witness testifying directly to the *corpus delicti* and sufficient corroborating circumstances is not in force in the Canal Zone and that if such rule is in force it is sufficiently met by the testimony of Burgoon.

It is true that no such rule of evidence has heretofore been stated by this court. There has arisen no occasion for such statement. But the whole body of criminal law in force on the Canal Zone has been transplanted from the United States, and in criminal cases the courts of the Canal Zone have invariably followed and enforced the same rules of evidence enforced by the courts of the United States. There is no reason known to us why an exception should be made with respect to the rule under consideration. On the contrary there is every reason why the rule should be followed in this American jurisdiction as well as in other American jurisdictions. It is a rule which has developed from the very nature of the crime of perjury. It might be said of it as was said by Judge Werner of the theory of the presumption of innocence when delivering the court's opinion in the case of *People vs. Molineux* (268 N. Y., 264) that it is the product of the wisdom and humanity of the ages. And, too, it is a beneficent rule making for the safety of individuals. Witnesses in judicial proceedings are so likely, through unconscious bias or misinformation or wrongful advice, to make misstatements as to material facts, and language itself is so faulty a medium for the conveyance of the average man's ideas that a charge which is primarily based on the corruptly false use of language ought to be difficult of proof.

We are therefore of the opinion that unless the evidence in the case before us discloses the testimony of one witness speaking directly to the *corpus delicti*, together with sufficient corroborating evidence, then the evidence is not as a matter of law sufficient to sustain the verdict and the defendant should have been acquitted by the trial court.

The fundamental matter in dispute in this case was whether as a matter of fact the \$150 and \$500 items or either of them had been paid by Kerr on the partnership account. It is clear that there is no testimony of any living witness directly contradicting Kerr's sworn statement in the Averbeck case that no payments had been made since July, 1910. Burgoon's testimony is not such direct testimony. So far as the account is concerned Burgoon testified only that there was no other open account between Averbeck and Kerr. On the contrary all of the testimony found in the case which speaks directly to the *corpus delicti* corroborates the sworn statement made by Kerr in the Averbeck case.

We have given this appeal the utmost consideration. We are aware that the evidence contains much which points the finger of suspicion at Kerr, and that inferences might be rightly drawn from such evidence prejudicial to the defendant's reputation for veracity and fair dealing, but we can not arrive at any other conclusion than that the evidence does not meet the requirements of the wise, safe, and beneficent rule of evidence which we have set forth. The verdict of the trial court should, therefore, have been a verdict of acquittal.

It is therefore ordered that the judgment of the lower court be reversed, that a verdict finding the defendant not guilty of the crime charged be entered, and that his bail be exonerated.

Reversed.

LAM HING *versus* F. A. LYNCH and ALICE LYNCH.

No. 125. Argued December 22, 1913. Decided March 3, 1914.

WEIGHT OF THE EVIDENCE.

It is not the province of the Supreme Court to reverse a judgment of the trial court on the facts unless the findings of the lower court were clearly and manifestly against the weight of the evidence.

Appeal from the Circuit Court of the Third Judicial Circuit;
Hon. Thomas E. Brown, Jr., Judge.

The facts appear in the opinion.

Hinckley and *Ganson*, for appellants. *W. H. Carrington*, for
appellee.

GUDGER, C. J. The record in this case discloses the following facts:

The defendant, F. A. Lynch, became involved and, wishing to extricate himself from his financial difficulties, called on the plaintiff to aid him in settling a certain amount which he owed a bank in Colon. The amount due seems to have been \$16,000. Of this amount the plaintiff advanced and paid the sum of \$12,000, leaving a balance due from Lynch to the bank of \$4,000. The defendant, Lynch, and the intervener, his wife, Alice Lynch, executed to the plaintiff a deed for certain properties located in New Gatun, some of which are the subject of this litigation. The plaintiff alleges that for the balance of \$4,000, making the total consideration of the deed, the defendant, Lynch, is owing him on an account that sum, and that by agreement between himself and Lynch this was to be credited, and was credited, making the consideration of the deed \$16,000. Lynch, however, contends that the plaintiff was not only to advance the \$12,000, but was to pay the additional \$4,000 to the bank, and that the deed executed by himself and wife was intended as a mortgage, and was so understood to be by all the parties thereto at the date of signing and delivering the same. This the plaintiff denies, and states that the transaction was complete when he paid the \$12,000 and gave credit for the \$4,000 as above set forth.

The intervener, Alice Lynch, alleges that some ten or twelve years ago she inherited a fund, and that it was invested in a certain house built on a lot leased in her name from the Panama Railroad Company, and included in the deed above referred to, and that when she signed said deed she did not know that the house, which was her separate property, was included; that in fact she did not understand or know the import of the instrument signed by her; and that, further, at the execution of the instrument her privy examination was not taken as prescribed by law; and she, therefore, asks that, in so far as her separate property is concerned, the deed be declared void.

It will be noted, therefore, that two questions are involved.

First.—Was the deed in question intended by the parties to be a mortgage?

Second.—Was the privy examination of the wife, under the circumstances, necessary, and, if so, was it properly taken?

There can be no question that a deed, absolute on its face, can, by a court of equity, be treated as a mortgage if such was the plain, unquestioned, and mutual agreement of the parties at the date of its execution and delivery. This fact should be clearly shown, and, in the case at bar, was submitted direct as a fact to be passed on by the court, and the court found that such was not the agreement; and, as the evidence fully sustains such finding, this court will not disturb the verdict on that account.

It may be noted further that this application on the part of the defendant is in the nature of equitable relief, and it may be questioned as to whether he would have been entitled to the relief sought even though his contention had been found to be correct until and unless he had offered to refund the \$12,000 advanced by the plaintiff. It is a well-settled rule that he who asks equity must do equity.

The intervening defendant claims that she had a lease on certain property which belonged to the Panama Railroad Company for a term of years, and that on this she erected with her own funds certain houses; that these houses were included in the deed mentioned, but that her privy examination to said deed was not properly taken. The certificate to the deed does not seem to be in strict accord with the statute required to pass a fee simple title, and the judge of the court below opened up the question and took evidence on this point, and found that, as a matter of fact, the law had been complied with. The court below does not seem to have passed upon the question as to whether it was necessary for a privy examination to be taken in a matter of a leasehold estate. The instrument called a deed was nothing more than a conveyance of whatever interest the maker had in a lease for years. There is a statement in the answer that the intervening defendant did not understand that her property was included, or the purport of the conveyance, but there is nothing in the record that would warrant a serious consideration of these points.

There is no error in the finding of the court below. Let the judgment be affirmed.

Affirmed.

CANAVAGGIO *versus* HABIB.

No. 127. Argued February 16, 1914. Decided March 30, 1914.

JURISDICTION. SUBJECT MATTER.

By jurisdiction of the subject matter is meant jurisdiction of the general class of cases to which the particular case belongs. Such jurisdiction is never waived and may be raised at any stage of the proceedings either in the trial or appellate court.

JURISDICTION OF THE PERSON.

Jurisdiction of the person is waived by appearance, notwithstanding an exception may be reserved to the ruling of the court in failing to dismiss for want of such jurisdiction.

Appeal from the Circuit Court of the First Judicial Circuit;
Hon. H. A. Gudger, Judge.

The facts appear in the opinion.

Harmodio Arias, for appellant. *Hinckley and Ganson*, for appellee.

JACKSON, J. On the 3d of December, 1913, the plaintiffs recovered a judgment against the defendants, Louis Habib and the copartnership of Habib, Nahas & Company in the sum of \$2,000 United States currency, and costs, and on appeal to this court by the defendant, Louis Habib, two questions are presented for our determination:

1. That the court below was without jurisdiction of the defendant, and

2. That the judgment is contrary to the evidence and to law.

In support of his second contention appellant insists that the judgment should be reversed because the suit was brought on a bill of exchange for 10,000 francs, alleged in the complaint to have been drawn by the plaintiffs on the copartnership of which the defendant, Louis Habib, was a member, which bill of exchange not being accepted was duly protested for nonpayment, whereas appellants allege the evidence disclosed an entirely different bill of exchange from that alleged in the complaint, viz, a bill, drawn by one L. Bodin in his own name upon the firm of Habib, Nahas & Company, payable in favor of the plaintiffs. The appellant insists that the bill of exchange, as drawn by the said Bodin upon the firm of Habib, Nahas & Company in Paris, is inconsistent with the allegation, paragraph 6 of the complaint, that

the said bill was drawn by plaintiffs themselves upon said Paris firm, and that the said bill of exchange as drawn by said Bodin was improperly received in evidence to support the allegations of the complaint; and he further insists that no suit could in fact have been maintained upon the draft as actually drawn by the said Bodin upon the Paris firm because in drawing said draft the said Bodin acted as an agent or representative and the agency was not disclosed upon the face of the draft. In support of this contention the appellant relies upon the following section of the Code of Commerce, Article 752:

Those persons who draw bills of exchange, endorse or accept them, as legal or conventional agents, can not bind their principals except by expressing in their signature their character as such.

and it is admitted that the bill of exchange admitted in evidence by the plaintiffs contains the signature of L. Bodin as the drawer thereof without expressing his representative capacity. Plaintiffs-appellees, however, contend that the action is one for debt and that it is not, strictly speaking, an action upon the bill of exchange but that the bill of exchange was referred to in the pleadings and offered in evidence merely as evidence of the debt.

It is therefore necessary to refer briefly to the allegations of the complaint, which are as follows.

On the 17th of May, 1913, in pursuance of his custom, said L. Bodin did obtain from the plaintiffs the sum of 10,000 francs or \$2,000 United States currency, with which to purchase pearls for the use and benefit of the defendant and the said copartnership of Habib, Nahas & Company, the plaintiffs drawing on said copartnership therefor by a draft payable 90 days after sight.

That the said L. Bodin did forthwith purchase pearls with the said \$2,000 obtained from the plaintiffs in the manner hereinafter stated and did forthwith forward to the said firm of Habib, Nahas & Company said pearls, the same being received and accepted by the said firm and placed on sale with the rest of the stock of the said copartnership.

That thereafter the said firm of Habib, Nahas & Company, although having received and accepted said pearls, obtained in the manner hereinbefore indicated with the money of the plaintiffs herein, refused to honor said draft for the purchase price of said pearls.

Wherefore the plaintiffs pray judgment in the sum of \$2,000.

These allegations we think set forth a cause of action on account of money loaned to said Bodin as an agent and representative of the defendants, which money was properly applied to the uses of the defendants and the pearls purchased and then received by them. The action we think is therefore; not strictly speaking, one upon a bill of exchange but an action for debt for money had

and received, in which the bill of exchange was referred to, unnecessarily it may be said, in the complaint and which was offered merely as evidence of the debt at the trial of the case. The defendant's objection in this respect can not therefore be sustained.

Defendant also insists that the court committed an error in denying the defendant's plea to the jurisdiction of the court for the following reasons:

"(a) Both parties are alien nonresidents of the Canal Zone.

(b) Said cause of action, if any, arose outside of the territorial limits of the Canal Zone, and

(c) The defendant particularly proceeded against has no property within the said territorial limits subject to the jurisdiction of the Canal Zone courts."

The plaintiffs set out in their complaint that they are residents of the Republic of Panama, and that the defendants are residents of the Republic of France, also that the cause of action arose within the Republic of Panama, and it is insisted by the defendant, Louis Habib, upon whom service was had in the Canal Zone that he was not a resident of the Canal Zone and that neither he nor the defendant company of which he was a member had any property which was subject to the jurisdiction of the Canal Zone court. It is therefore claimed that the court was without jurisdiction pursuant to the provisions of the Executive Order of July 28, 1910. The said Executive Order provides as follows:

No civil action or special proceeding shall be brought or proceeded with in the courts of the Canal Zone, in any case in which both of the parties, plaintiff and defendant, are alien nonresidents of the Canal Zone, and the cause of action is one which arose without the territorial limits of the Canal Zone Government, and the party proceeded against has no property within said territorial limits, subject to the jurisdiction of the Canal Zone courts.

The defendant, Louis Habib, moved to dismiss in the court below for want of jurisdiction and the court upon hearing of the jurisdictional facts presented, viz, as to nonresidence of said Louis Habib and as to whether or not there was property within the territorial limits of the Canal Zone, overruled the motion and thereupon the defendant, not electing to stand upon this question, but merely excepting thereto, filed an answer herein and went to trial upon the merits of the case with the result that judgment was rendered in favor of the plaintiff for the full amount. It is insisted by the plaintiff:

(1) That the court below did not err upon his finding of the jurisdictional question of fact, and

(2) That even so, the question of jurisdiction was waived by the defendant in filing answer and going to trial.

As to the first question we must here repeat what was said by this court in the case of *Blue vs. Panama Timber Company* as follows:

The question of jurisdiction was presented at the trial court upon these disputed facts and the trial court overruled the plea of lack of jurisdiction and found the essential jurisdictional facts in favor of the plaintiff. This finding we are not disposed to disturb * * * , but, moreover there was proof tending to show that the defendant had property within the Canal Zone, and the record fails to show any reason for disturbing the finding of the court below upon these jurisdictional questions of fact.

And so, in the present case, the record shows that the defendant, Louis Habib, lived at the Hotel Tivoli for a long period of time while transacting business in the Republic of Panama, also there was evidence tending to show that he had moneys and jewels of the value of about \$10,000 in the safe of the Hotel Tivoli and that these jewels he was buying and selling in the course of his business. Under these circumstances we think the court below was quite justified in finding that the defendant, Louis Habib, was domiciled and had a temporary residence within the Canal Zone and also that he and the defendant company had property in the Canal Zone subject to the jurisdiction of the Canal Zone courts.

But furthermore, it can not be doubted that the Canal Zone court had jurisdiction of the subject matter of the action, that is, it had jurisdiction of the general class of cases to which this particular case belongs. The jurisdictional question presented was therefore as to the person of the defendant and not as to the subject matter, and it has been repeatedly held that while the question of jurisdiction of the subject matter is never waived by appearance and that the same can be raised at any time, even for the first time in the highest court of review, that nevertheless the question of jurisdiction of the person of a defendant can be and is waived by appearance, notwithstanding an exception may be reserved to the action of the court in failing to dismiss for want of personal jurisdiction. This is so universally recognized as a sound principle of law that it is hardly necessary to cite authorities. However, those cited by the plaintiffs-appellees in their brief, viz:

Union Pacific Railway Company vs De Busk, 3 L. R. A., 350.

Brand vs. Brand, 63 L. R. A., 205.

Corbett vs. Casualty Association of America, 16 L. R. A., 117.

appear to sustain the proposition herein stated.

It may be further stated that the attorney for appellant, Louis Habib, states in the conclusion of his brief herein that the evidence was not sufficient to establish the fact that defendants, Habib, Nahas & Company, was in fact a partnership and appellant also contends that the evidence was not sufficient to show that said Bodin was a member of said partnership or was a duly authorized agent thereof at the time of the borrowing of the money from the plaintiffs so as to make the defendants liable therefor, but these were questions of fact that were all presented to and considered by the court below and these findings of fact we are not disposed to disturb.

It follows that the judgment of the court below must be and the same is hereby affirmed with all costs to the plaintiffs-appellees.

Affirmed.

CLARKE, Administrator, *versus* THE McCLINTIC-MARSHALL CONSTRUCTION COMPANY.

No. 128. Argued February 16, 1914. Decided March 30, 1914.

WEIGHT OF EVIDENCE.

It is not the province of the Supreme Court to reverse a case on the facts unless the findings of the trial court were plainly and manifestly against the weight of the evidence.

Appeal from the Circuit Court of the First Judicial Circuit;
Hon. H. A. Gudger, Judge.

The facts appear in the opinion.

W. H. Carrington and *V. G. De Suze*, for appellant. *W. C. Todd*, for appellee.

JACKSON, J. This is an action wherein the plaintiff, as administrator of the estate of Henry Clarke, deceased, sought to recover the sum of \$15,000 damages on account of the death of the said Henry Clarke at Miraflores on or about the 7th day of January, 1913.

The allegations of negligence as set forth in the complaint are substantially that on or about the 7th of January, 1913, the deceased was in the employ of the Isthmian Canal Commission as a "concrete man" working in the bed of the locks at Miraflores,

immediately under and in the vicinity of a certain bridge whereon the defendant company was carrying on its operations in connection with the aforesaid lock construction work; that the defendant, its agents, and servants knew, or should have known of the fact that plaintiff's intestate and others were engaged in the lawful exercise of their duties in the bed of the locks and under said bridge, and notwithstanding such knowledge on the part of the defendant, its agents, and servants, continued to so carelessly, negligently, and unskillfully conduct its business that while plaintiff's intestate was at work in the bed of the locks immediately under a bridge used by the defendant company in the prosecution of its work, a large piece of timber which was being handled by defendant's servants and agents was, without due and proper warning and notice being given, thrown from the aforesaid bridge to the bed of the locks where the deceased was at work and that the same fell upon plaintiff's intestate's head, striking him down and resulting in immediate death.'

The answer is a general denial of all allegations of negligence.

At the trial of the case, August 13, 1913, the defendant moved to dismiss after the conclusion of plaintiff's evidence which motion was overruled and exceptions taken. Evidence was then offered on behalf of the defendant and the court rendered judgment in favor of the defendant. Motion for a new trial was made and overruled and the case is before this court on appeal by the plaintiff-appellant solely upon the following assignments of error:

- (1) That said judgment is contrary to law.
- (2) That said judgment is contrary to the evidence and manifestly against the weight of the evidence.

The facts appearing from the bill of exceptions show that some time prior to the death of deceased he worked as a "car or bucket-man" for the Isthmian Canal Commission in the locks at Miraflores in the vicinity of the defendant's work, a distance therefrom of 40 or 50 feet, and that the deceased was quite familiar with the overhead work of the defendant and cognizant of the dangers attendant upon objects falling from the bridge overhead, used by the defendant, to the locks below. At the time of his death he was employed as a "concrete man" on the floor of the locks at a distance of from 40 to 140 feet from the overhead bridge; that at the time of the injury resulting in his death, the deceased passed under the bridge for the purpose of getting a drink of water at a time when the crane on the overhead

bridge was hoisting material; that the deceased had been warned by his foreman, Mr. McCormick, to keep from under the bridge because the place was dangerous; that on this occasion a large block of wood was placed at the base of the crane to steady it and that the block in question was being held and sustained by one Carrington, an employee of the defendant, and on account of the weight of the girder being raised, the block twisted and released itself from Carrington's hand and fell on the deceased, that before beginning to raise the girder, men looked down to see if anyone was below and the customary warning signals were given.

No positive affirmative act of negligence was proved or attempted to be shown at the trial of the case but the plaintiff below relied upon the doctrine of *res ipsa loquitur*; that the falling of the block of wood in and of itself raised a presumption of negligence. The defendant, considering that no negligence had been proved, moved to dismiss at the conclusion of the plaintiff's case but this motion was overruled and thereupon the defendant introduced evidence on its own behalf, particularly that of Goucher and Carrington, to show that all proper care was exercised and that the block of wood fell as a result of an unavoidable accident. In the first place we may say that from the facts disclosed by the record, we think the court might have been justified in granting the motion of the defendant to dismiss at the close of plaintiff's case as under the circumstances of the particular case the doctrine of *res ipsa loquitur* is hardly applicable. As stated in Cooley on Torts, section 1424, "The accurate statement of the law is not that negligence is presumed, but that the circumstances amount to evidence, from which it may be inferred by the jury." It has frequently been held that the falling of objects from construction work overhead upon sidewalks and crowded streets or thoroughfares below is sufficient to call for the application of the doctrine of *res ipsa loquitur*. But we must say that the construction work in and about the locks, especially where the injury occurs to one who is employed in the immediate vicinity and has been duly warned and knows of the danger of objects falling from above, presents a very different case.

However, the trial judge overruled the motion to dismiss, giving the plaintiff below every benefit that might arise from the possible application of the doctrine of *res ipsa loquitur* and thereupon the defendant undertook and assumed the burden of proving that the injury resulting in the death was not the result of any carelessness or negligence whatsoever, but that, on the contrary, it was an

accident which ordinary care and prudence under the circumstances would not have prevented. Upon the evidence adduced the question therefore became one of fact for the trial judge to consider and determine and looking at the evidence in its entirety we are unable to say that the finding of the court below was so manifestly contrary to the evidence as to justify this court in reversing its judgment. This court has repeatedly held that its province in such cases is limited to reviewing the questions of law presented. In this particular case the question of negligence or want of negligence, after the defendant had introduced its evidence, became essentially a question that under ordinary circumstances with a jury would have been a question of fact for the jury to find under proper instructions from the court and being tried by a court without a jury, then became a question of fact for the court.

The finding of the court that there was no negligence seems well sustained from the record and it follows that the judgment of the court below must be, and the same is hereby, affirmed with all costs to the defendant-appellee.

Affirmed.

HINCKLEY and GANSON *versus* ESPRIELLA.

No. 130. Argued January 28, 1914. Decided March 3, 1914.

WEIGHT OF THE EVIDENCE.

It is not the province of the Supreme Court to reverse a case on the facts unless the findings of the trial court were plainly and manifestly against the weight of the evidence.

Appeal from the Circuit Court of the Second Judicial Circuit;
Hon. Thomas E. Brown, Jr., Judge.

The facts appear in the opinion.

Harmodio Arias, for appellant. *Hinckley and Ganson*, for appellees.

JACKSON, J. In this action instituted in the Circuit Court in and for the Second Judicial Circuit, the plaintiffs sought to recover from the defendant the sum of \$1,225 United States currency on account of a contract for legal services rendered. The

plaintiffs alleged that the defendant was the owner of an undivided one-half interest in and to 2,400 hectares of land situated within the Canal Zone, being a part of the estate of "Miraflores" and that they made an agreement with the defendant whereby they were to represent him before the Joint Land Commission for the purpose of obtaining as satisfactory an award as possible by said commission as to the value of the 1,200 hectares of land belonging to said defendant, the plaintiffs to receive in consideration for their services the sum of 7 per centum of the value of said lands in accordance with said award and that the plaintiffs' services were reasonably worth the amount mentioned. That the Joint Land Commission awarded to the defendant the sum of \$17,500 United States currency, as the value of said lands, the same being approximately at the rate of \$14.50 per hectare and that, therefore, the amount of money due and owing by the defendant to the plaintiffs is the sum of \$1,225.

The defendant, for answer, admits that the plaintiffs made an agreement with the defendant whereby they were to represent him before the Joint Land Commission, but denies that by virtue of that agreement, plaintiffs were to receive in consideration of their services the sum of 7 per centum on the total amount but only 7 per centum on the excess over the sum of \$10 per hectare that might be given in the award of the Joint Land Commission.

The acting judge of the Second Circuit found the issues in favor of the plaintiffs and gave judgment for the full amount claimed viz: \$1,225 United States currency and all costs. In his opinion filed therein, the trial judge stated:

The evidence is conflicting and as the agreement is not in writing, and the only witnesses of weight are the plaintiffs and the defendant, it might be somewhat difficult to arrive at a just conclusion were it not for the fact that in my opinion the sum of \$1,225 or 7 per cent of \$17,500 is a reasonable fee for the services performed; very much less than has been formerly collected by attorneys on the Canal Zone for similar services.

I find that the plaintiffs have sustained the burden of proof and find the issues in their favor.

It will thus be seen that the question presented is solely one of fact, and it may be stated that the case is truly a regrettable one in that it presents a disputed question of fact between the plaintiffs, who are attorneys of standing and reputation at this bar, and the defendant, formerly a judge of the highest court of Panama and now a practicing attorney before the Panamanian

courts, and well known as a gentleman of veracity, probity, and honor. But the court below found the issues of fact in favor of the plaintiffs and it is well settled in numerous decisions that it is not the province of this court to reverse a case on the facts unless the findings below were clearly at variance with the evidence.

As stated in *Thayer vs. Andrade*, Canal Zone Supreme Court, No. 58:

A careful perusal of the record discloses that the main contentions of appellee are all denied by appellant. In this particular the court below found for appellee. We are not disposed to disturb such findings of fact as it is a well-settled principle of practice that unless the weight of the evidence is manifestly against the finding, the judgment of the tribunal who heard the witnesses, saw their manner of testifying, and, therefore, had much better opportunity to judge of the weight to be given their testimony than the reviewing court, the finding should not be disturbed.

It is impossible to believe that either party to this action, in his testimony given in the court below, was guilty of conscious or deliberate falsehood. There was evidently some unfortunate and regrettable misunderstanding, but, nevertheless, the trial court found the issues in favor of the plaintiffs and a careful reading of the record does not justify this court in reversing the case for the reason that its findings were clearly at variance with the evidence. On the contrary, the finding of the trial court seems well sustained by the weight of the evidence.

There is the testimony of Mr. Ganson directly in line with his contention and fortified by his statement that the contract was actually drafted and presented to the defendant, embodying the agreement for 7 per cent upon the total amount obtained. This is denied by the defendant, but in addition there is the testimony of Dr. Inocencio Galindo to the effect that he brought the parties together and that it was his understanding that the agreement was as claimed by the plaintiffs. In this respect he testifies as follows:

I don't know from whom I got my information; either from Dr. Espriella or Messrs. Hinckley & Ganson, but I understood it was 7 per cent on the whole of the amount that was awarded by the Joint Commission.

Counsel for appellant bases his objections to a great extent upon the language of the court below with reference to the reasonableness of the fee for the services performed in which the court states it is his opinion that the sum of \$2,225 or 7 per cent of \$17,500 is reasonable and much less than is customary for such services.

He claims there was no evidence of the reasonableness of the service which justified the court in so stating but we find from the record that Dr. Galindo testified that he had practiced law more or less from 1865 to 1909, that he was familiar with the handling of claims before the Joint Land Commission and that he considered the fee of 7 per cent upon the whole amount to be reasonable. He further stated that he had property in the Canal Zone known as "Yseca" and that he had made a contract with Hinckley & Ganson to represent him before the Joint Commission with reference to this property, by the terms of which he was to pay them 10 per cent upon the total amount. There would, therefore, seem to be evidence in the record that justified the trial judge in reaching this conclusion. But we may add that this statement of the trial judge could not in any event affect the result inasmuch as he states in his opinion decisively that he finds the plaintiffs have sustained the burden of proof.

For the reasons stated it follows that the judgment of the court below must be and is hereby affirmed with all costs to the plaintiffs.

Affirmed.

N. KOURANY, *et al.*, versus I. Halman, *et al.*

No. 134. Argued May 6, 1914. Decided June 25, 1914.

FALSE IMPRISONMENT AND MALICIOUS PROSECUTION. JOINDER OF ACTIONS.

A complaint containing two counts, one in false imprisonment and the other in malicious prosecuting may be joined provided they are between the same parties and arise out of the same transaction.

ARREST OF DEFENDANT.

An affidavit in support of a motion for arrest of a party defendant must contain positive allegations of fact and must show that a cause of action exists in order to give the court jurisdiction to grant the order of arrest.

ADVICE OF COUNSEL.

Advice of counsel is no defense in an action for false imprisonment.

Appeal from the Circuit Court of the Second Judicial Circuit;
Hon. William H. Jackson, Judge.

The facts appear in the opinion.

Hinckley and Ganson, for appellants. *Hall and Van Dame*, for appellees.

BROWN, J. In December, 1914, a proceeding was begun in the Circuit Court of the Second Judicial Circuit praying that the appellants be declared insolvent, that they be compelled to cede their partnership property to their creditors and that a receiver thereof be appointed. This application was granted and the receiver was duly appointed and the partnership property turned over to him. Thereafter, on the 3d day of January, 1914, the respondent, I. Halman, as attorney in fact for Rosenberg & Sons, filed in said court and as a part of said insolvent proceedings, a motion and affidavit asking that appellants be arrested and confined subject to the order of the court for reasons set forth in said affidavit. As security to obtain the order of arrest, the usual bond in the sum of \$10,000 was filed and a certified check for said amount deposited with the clerk of the court. The appellants were thereupon arrested by order signed by the judge of the Second Circuit. After the appellants had remained in jail 3 days a hearing was had, the order of arrest was vacated and the appellants discharged from custody. Thereafter the appellants filed their complaint in the court below praying a judgment for damages against the respondents, Halman and Sasson, who had executed as principal and surety the bond given to secure the order of arrest. The allegations of this complaint were set forth in two counts, one alleging false imprisonment and the other alleging malicious prosecution. When the action for damages came on for trial, the court below, on motion of the respondents, defendants below, compelled the plaintiffs to elect on which of said two counts they would proceed to trial and the plaintiffs, duly excepting to the court's ruling, elected to proceed under the count alleging malicious prosecution. After the trial of the case on the merits, the trial court entered a judgment against the plaintiffs and in favor of the defendants. From this judgment the plaintiffs appeal to this court.

The appellants ask this court to find that the court below erred in compelling them to elect between the two counts in their complaint and on the whole case to enter a judgment in their favor without remanding for a new trial.

We think that there is no doubt that the court below was in error in compelling an election between the causes of action set out in the complaint. It would have been different in common law pleading; for in common law pleading, trespass was the remedy for false imprisonment and case the remedy for malicious prosecution, so that a declaration containing allegations both of false

imprisonment and malicious prosecution would have been bad because of misjoinder of causes. But it is an elementary principle of code pleading that all actions may be joined which are similar in their nature, arise out of the same transaction, and are between the same parties. This rule is common to many jurisdictions wherein code pleading is in force and hardly needs citation of authority to support it. It is well stated in Bliss on Code Pleading, 3d edition, section 112, as follows:

The plaintiff may unite in the same complaint several causes of action whether the same be such as have heretofore been nominated legal or equitable, or both, when they all arise out of (1) the same transaction or transactions connected with the same subject of action; (2) contract express or implied; (3) injuries with or without force to person or property or either; (4) injuries to character; (5) claims to recover real property with or without damages for the withholding thereof; (6) claims to recover personal property with or without damages for the withholding thereof; (7) claims against a trustee by virtue of a contract or by operation of law. But the causes of action so united must all belong to one of these classes and must affect all the parties to the action and not require different places of trial and must be separately stated.

In the case under consideration the complaint was in effect an action to enforce the penalty of the security bond and for that reason any causes of action for damages growing out of the arrest might properly have been joined therein; and if the plaintiffs could properly unite such causes of action in their complaint it follows that they should not be limited in the trial by compulsory election between the causes of action they had alleged.

And the trial court's error in the foregoing respect was prejudicial to the rights and interests of the plaintiff, for in order to maintain their count for malicious prosecution it was necessary for plaintiffs to prove malice and want of probable cause for the arrest while no such proof would have been necessary to sustain an action for false imprisonment. In this respect the remark of the trial judge which is found in the records is pertinent, viz:

That there might have been some question about the illegality of the arrest but that the election to proceed on the second count required plaintiffs to prove lack of probable cause and malice.

All the facts pertaining to the arrest were necessarily introduced in evidence in the court below and are in the record here. It is therefore proper for us to discuss the question of the legality of the arrest complained of.

The order of the arrest was granted upon the following affidavit:

UNITED STATES OF AMERICA
CANAL ZONE.

In the Circuit Court in and for the Second Judicial Circuit.

In the matter of the insolvency of
Kourany, Felaifel & Zarour, a co-
partnership.

Motion for arrest of defendants.

Come now B. Rosenberg & Sons, petitioners herein, by their attorney-in-fact, I. Halman, and their attorneys-at-law, Hall and Van Dame, and respectfully represent and pray:

1. That petitioners, by and through their said agent, I. Halman, are informed, verily believe, and are prepared to present grounds for their belief to the court, that the said firm of Kourany, Felaifel & Zarour, and each and every member of said firm, to wit, N. Kournay, E. Felaifel and J. Zarour, have removed, concealed, and disposed of certain portions of their property, and are now concealing and are about to remove and dispose of certain portions of their property, with intent to defraud their creditors, in that, to wit:

(a.) That they have for several months last past, and up to the 30th day of December, 1913, been conducting their business as general merchants in the cities of Empire and Culebra, C. Z., that they have sold large amounts of goods from said stores, and have received cash in payment therefor; that they have concealed said money, and are concealing the same or portions thereof, and are about to remove and dispose of the same, with intent to defraud their creditors; that they for a period of several weeks last past have suspended payment of their obligations, and have failed to use the money received by them in the course of their business to pay their due debts, although they are largely indebted to said creditors.

(b.) That the said firm, and each of the members of said firm has removed certain goods, wares, and merchandise from the stores of said firm where such goods, wares, and merchandise are ordinarily kept by said firm, and has concealed said goods, wares, and merchandise so removed in places unknown to your petitioners.

2. That petitioners, by and through their said agent, I. Halman, are informed that the members of said firm have stated that they will leave the Canal Zone at an early date unless they can make a settlement with their creditors by which they will pay said creditors only a portion of the amounts due.

3. That petitioners extended credit to the said firm and to the members thereof upon the strength of certain financial statements submitted by said firm to petitioners, as to the status, standing, assets, and liabilities of said firm; and that petitioners verily believe that said financial statements were false and fraudulent.

Whereof, petitioners respectfully pray, in accordance with section 427 of the Code of Civil Procedure of the Canal Zone, that an order be issued for the arrest of each of the members of the said firm, namely, N. Kourany, E. Felaifel, and J. Zarour, and that each and every one of said persons be taken

into custody and so confined in accordance with law and subject to the order of the court.

(Signed) HALL and VAN DAME,
Attorneys for Petitioners.

UNITED STATES OF AMERICA, }
CANAL ZONE, } ss:
SECOND JUDICIAL CIRCUIT, }

Before me, the undersigned Clerk of the Court in and for the Second Judicial Circuit of the Canal Zone, personally appeared I. Halman, whose name is subscribed hereto and being first duly sworn, on oath states that he knows the contents of the foregoing petition, and that the facts contained therein are true, except those stated to be on information and belief, and as to those, that he verily believes them to be true.

(Signed) H. R. TOWNSEND.

(Signed) I. HALMAN,
Attorney in fact for Petitioners.

It will be noted that the foregoing affidavit is entitled in the insolvency proceeding hereinbefore referred to and not in any action for debt or the recovery of personal property begun or pending between Halman or any other person or persons and the appellants. In this and other respects which we shall point out we are of the opinion that the affidavit does not comply with the requirements of the sections of the Code of Civil Procedure relating to the subjects of arrests. These sections must be strictly construed, for a loose and easy construction endangers the rights and liberties of the public. It is clear that from beginning to end, section 427 of the Code of Civil Procedure contemplates that an order of arrest should be granted only in an action against a defendant to recover money, or damages on a cause of action arising upon contract, express or implied, or in an action for money or property fraudulently converted or misapplied by certain specified fiduciaries, or in an action to recover the possession of personal property unjustly detained when same, or any part thereof, has been concealed, etc. In such actions the defendant may be arrested, provided it is made to appear by proper affidavit to the satisfaction of the judge to whom the application is made (see section 429) that the defendant has removed or disposed of his property with intent to defraud creditors or is about to do so; that he was guilty of a fraud in contracting the debt or incurring the obligation upon which the action is brought or in concealing or disposing of the property for the conversion, etc., of which the action is brought, or that, when the action is for money or damages arising up on contract the defendant is about to depart from

the Canal Zone with intent to defraud his creditors. It is plain that the order of arrest should only be granted in an action of the kinds specified which is already pending or which is begun by the filing of a complaint simultaneously with the presentation of the affidavit required by section 429. The insolvency proceeding is not such an action. If, nevertheless, it be objected that in an involuntary insolvency proceeding there should be some remedy against an insolvent debtor who is concealing or attempting to conceal his assets, it may be answered that if it were shown that the insolvents had refused after due demand to deliver any assets to the receiver already appointed, it would have been possible to proceed against the insolvents in such manner as to punish them for a contempt of court.

In respect to the disposal of assets, however, and of the other matters attempted to be alleged to secure the order of arrest, the affidavit is totally defective. It does not comply in any respect with the provisions of section 429 of the Code of Civil Procedure. This section is as follows:

A judge shall grant an order of arrest when it is made to appear to him by affidavit of the plaintiff, or some other person who knows the facts, that a sufficient cause of action exists, and that the cause is one of those mentioned in section 427.

It is not necessary to enter upon a lengthy discussion as to the meaning of the foregoing section. It means what it says. It does not mean that the judge shall be satisfied by a promise to present proof and facts at some future date. (See first section of the affidavit). It does not contemplate allegations which are merely enlargements of the legal phraseology of the provisions of the code. On the contrary the intendment of the section is that the affidavit shall actually and positively set out facts which make a *prima facie* case of such a nature that the judge may conclude therefrom that the cause of action in which arrest is asked is one of those mentioned in section 427.

Now the affidavit under consideration is not one containing positive allegations of fact. It was not made by a plaintiff knowing the facts for there was no action pending, nor was it made by any other person knowing the facts, for its averments are based on information and belief. There are no suggestions as to the basis of this information and belief, and the allegations thus made on information and belief are hardly allegations of specific facts but largely a strange mixture of generalities and conclusions of

law. As set out in the affidavit, the averments are only matters of opinion and hearsay. If false, no prosecution for perjury could be founded on them except upon proof of the difficult negative that no person had so informed the affiant. There is no averment that any definite sum of money or amount of damages is due the affiant or any definite, specific property detained from him. In a word, the affidavit essentially fails to furnish the evidence necessary to give jurisdiction to grant the order of arrest. (See *Peterson vs. Nesbit*, 105 Pac., p. 135; *Ex parte Ekimoto*, 120 Cal. 316; and the cases cited in 3 Cyc., p. 934 *et seq.*)

It follows that the order of arrest, though regular on its face, was wholly illegal and void, and that the imprisonment of the appellants herein was false and without warrant of law.

It is urged that the defendants and respondents in the case now before us consulted counsel before applying for the order of arrest, and that having acted on advice of counsel, there arises from such fact a complete defense against an action for damages for false imprisonment. If it were true that advice of counsel is a good defense to such an action it would, nevertheless, be necessary to show definitely that such advice had been given after the respondents had fully and fairly disclosed all the facts of their case to their counsel. The record does not, however, reveal such a state of affairs. But such a defense is of no avail in actions for false imprisonment. Advice of counsel is of avail only to negative the existence of malice, and malice, as has already been said, is not a necessary ingredient of false imprisonment.

It is, therefore, our opinion that the appellants are entitled to a judgment for damages for the false imprisonment shown by the record. But we are not of the view that the amount of such judgment should be much more than nominal. The record contains much evidence of bad business and personal character on the part of appellants. There is little question in our minds that their business dealings had been such that their standing in the community was not greatly injured, if injured at all, by the arrest. Nor is there much question that the respondents, rather than the appellants, suffered from the general relations of the parties with each other.

In conformity with the foregoing it is ordered that the judgment of the lower court be and hereby is reversed, and it is adjudged that the plaintiffs appellants jointly recover of the defendants respondents, the sum of \$200 as damages together with costs in

all courts, and that such judgment be satisfied out of the money deposited with the clerk of the lower court as security to obtain the order of arrest.

Reversed.

C. P. FAIRMAN *versus* UNITED FRUIT COMPANY.

No. 140. Argued June 6, 1914.—Decided June 25, 1914.

BILL OF LADING.

In the absence of fraud and deceit or mistake, the shipper is bound by the terms of the bill of lading that has been delivered to and accepted by him or his agent.

CHARTER PARTY.

One who charters a vessel for a voyage, a portion of a voyage or for a fixed period of time is a charterer within the meaning of the term used in the Harter Act.

THE HARTER ACT.

The owner, agent or charterer of a vessel is not liable for loss or damage occasioned by negligence in navigation provided that the vessel was properly manned, equipped and supplied and in all respects seaworthy at the time that it left port.

Appeal from the Circuit Court of the Third Judicial Circuit;
Hon. Thomas E. Brown, Jr., Judge.

The facts appear in the opinion.

Hinckley and Ganson, for appellant. *Fairman, MacIntyre and Enderton*, for appellee.

GUDGER, C., J. This is an appeal from a judgment entered in the Third Judicial Circuit in favor of the plaintiff for the sum of \$718 and the facts are substantially as follows:

On the 7th day of June, 1907, the plaintiff deposited with the United Fruit Company at New Orleans, La., two boxes containing wearing apparel, etc., to be shipped to the plaintiff in care of agent (supposed to mean United Fruit Co's agent) at Colon, R. P. A. bill of lading was issued and received by the plaintiff in due course of mail, but as to who delivered the goods to the defendant company in New Orleans, is not stated in the record.

They were, however, sent on the order of the plaintiff from a warehouse in Kansas City, Mo., where they had been stored for

something over a year. They were to be transported to Colon on the S. S. *Preston* and were loaded on board that ship.

The ship sailed out of New Orleans a few days after the 7th and was stranded on rocks about two days out, and after remaining on the rocks for some six weeks, in order to relieve the ship, a large portion of the freight, some two-thirds, was thrown overboard and the remainder of the goods was badly injured by the sea water which had entered the ship while so stranded. The ship was then carried, partly under her own steam but mainly in tow, to New York City for repairs. The goods not jettisoned but damaged were sold in New York and a general average adjustment was made, the goods bringing about \$500 net and the ship contributing some \$18,000, and this amount was prorated, the plaintiff being allowed the sum of \$202.

In the bill of lading issued to the plaintiff it was provided that the company would not be liable for:

stranding or other accidents of navigation of whatsoever kind, even when occasioned by the negligence, default or error in judgment of the pilot, master, mariners or other servants of the shipowner.

This provision was subject to the fact that the company used due care and diligence to see that the ship was properly manned and in all respects seaworthy when it left port. It was also agreed by section 19 of the bill of lading that in case of any accident that the rules and regulations pertaining to what is known as the Harter Act, passed by Congress of the United States, should apply thereto. Section 3 of the Harter Act reads as follows:

That if the owner of any vessel transporting merchandise or property to or from any port of the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied, neither the vessel, her owner or owners, agent or charterers, shall become or be held responsible for damages, or loss resulting from faults or errors in navigation, or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process or for loss resulting from any act or omission of the shipper, or owner of the goods, his agent, or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.

The question of law by which this case is to be determined may be considered under the following subdivisions:

1. Did plaintiff make a *prima facie* case?

2. Did he accept the bill of lading issued by the company?
3. Were the defendants charterers of the Steamer *Preston*?
4. Did the defendants "exercise due diligence to make said vessel in all respects seaworthy and properly manned, equipped and supplied"?
5. Does the Harter Act apply to the case at bar?

The first proposition may be dismissed with the general statement that the plaintiff did make a *prima facie* case in the court below.

As to the second proposition, the bill of lading was issued and sent to and received by the plaintiff in due course of mail and there is nothing in the record to signify that he objected to any provisions contained therein. Not only so, but after keeping the said bill of lading for more than a year, he files it in this case as a part of his complaint. There is no suggestion that there was fraud or deceit or collusion in connection with its issuance.

Bills of lading are usually on printed forms and signed only by the carrier or his agent. Generally, the acceptance of the bill by the shipper or his agent, is, at least in the absence of fraud, deceit or mistake, conclusive evidence of his assent to its conditions.

Elliot on Railroads, 2d Ed., Vol. 4, sec. 1417.

Jennings *vs.* Grand Trunk Ry. Co., 127 N. Y. 429.

Zimmer *vs.* N. Y. Cent. Ry Co., 137 N. Y., 460.

A bill of lading is an instrument well known to the commercial law, and, according to mercantile usage is signed only by the master of the ship, or other agent of the carrier, and delivered to the shipper. When thus signed and delivered, it constitutes not only a formal acknowledgment of the receipt of the goods therein described, but also a contract for the carriage of such goods, and defines the extent of the obligations assumed by the carrier.

The Henry B. Hyde, 82 Fed. 681, 1. c., 682.

The Delaware, 14 Wall (U. S.), 579.

Some of the authorities hold that the acceptance of such a receipt or bill of lading, without objection, is *prima facie* evidence of assent to the proposed contract, but the better rule, and that supported by the weight of authorities is that, in the absence of fraud, imposition, or the like, it is conclusive.

Elliot on Railroads, 2d Ed., 4 Vol., sec. 1502.

Kirkland *vs.* Dinsmore, 62 N. Y. 171.

Germania Ins. Co. *vs.* Memphis R. R. Co., 72 N. Y., 90.

The delivery of the bill of lading by the defendant and its acceptance by the plaintiffs, at the time of the delivery of the goods, must be deemed to constitute a contract between the parties with the conditions contained in the bill of lading.

Bank of Ken, *vs.* Adams Expr. Co., 93 U. S. 174, 23 Law Ed., 872.

The acceptance of the bill of lading binds the shipper and precludes him from alleging ignorance of its terms.

Wirthmeyer vs. Pennsy. R. R. Co., 1 Fed., 232.

Where the shipper accepted and acted on a paper given to his agent as a bill of lading, and which contained a provision limiting the carrier's liability in case of loss he can not deny that such was the contract on the ground that his agent was unable to read it.

M. K. & T. Ry. vs. Patrick, 144 Fed., 632.

Some evidence appears in the record tending to show that plaintiff's agent who negotiated the contract of shipment with defendant's agent at South Canadian, could not read, and did not know or appreciate the force of the provision limiting defendant's liability. The printed but unsigned paper was received and acted upon by her as the contract of shipment. There is no evidence of any fraud, hasty action, imposition, or other conduct on the part of the station agent tending to prevent the shipper's agent from knowing or understanding the contents of the paper. Moreover, the husband, after receiving the paper, with full knowledge of all the facts, adopted and ratified it as his contract with the carrier. For both these reasons he can not be heard to say that his agent did not read or appreciate the provisions of the contract from which he now seeks to escape.

M. K. & T. Ry. Co. vs. Patrick, *supra*, citing:

Kirkland vs. Dinsmore, *supra*.

Schaller vs. C. & N. W. Ry. Co., 97 Wis., 31.

In the absence of fraud, concealment, or improper practice, there is usually the presumption which may be conclusive, that acceptance of the bill of lading constitutes assent to its provisions, and it has been held even though the shipper did not read them, as it was his duty to do.

Elliot on Railroads, 2d Ed., Vol. 4, sec. 1723.

In discussing the third point it may be well to refer to the allegation of the complaint, which states as follows:

The said defendant is and was at all times hereinafter mentioned, a corporation engaged, among other things, in the business of a common carrier of passengers and freight for hire between the port of New Orleans, Louisiana, U. S. A., and the port of Colon, R. P.

The evidence shows clearly that in transacting the business as alleged by the plaintiff, they had hired or chartered the *S. S. Preston* as a means of conveying said freight and passengers.

Benedict on Admiralty, 3d Edition, section 287, reads as follows:

When a ship, or a specified portion of it, is hired out in mass for a voyage or a portion of a voyage, for a gross sum, or so much a ton, a voyage, a month or the like, the contract is usually called a chartering of the vessel. A charter

party strictly is a deed in two parts divided, *charta partita*. When not under seal it is called a memorandum of a charter. When not in writing it is not properly a *charta*, but it is nevertheless, usually spoken of as a charter. The jurisdiction and the law of the American Admiralty is the same, whether the agreement be a deed, a writing, or a mere verbal agreement.

There is no contention that the charterers of the *Preston* did not exercise due diligence to make said vessel in all respects seaworthy and properly manned, equipped and supplied, and the evidence on this point is conclusive that such precaution had been properly taken by the defendants.

The next and only remaining point to be discussed is: Does the Harter Act apply to the case at bar?

The goods were shipped from New Orleans, an American port; the bill of lading was issued at New Orleans; it was accepted by the plaintiff as of New Orleans; the entire transaction was as of New Orleans; the parties agreed in their bill of lading that this act should apply, and it is hard to see how there can be the least question in regard to it.

The plaintiff points to the fact that the captain of the *Preston* ran at full speed on a dark, cloudy night and that such conduct on his part was not the use of due care in navigating the ship; that when the accident occurred he was 12 miles out of his regular course, and that the rocks on which he stranded were clearly set forth on the map in his possession and known to him at the time; that in the event that the night was so dark he could not take his bearings it would be negligence for him to run at regular speed; that if the night was not dark and cloudy that it was negligence on his part not to know he was 12 miles out of his regular course, and therefore, the company was bound by his negligent act.

For reasons best known to the lawmakers, the old established and well-understood rule that the negligence of an agent or an official is negligence of the company had been, by the Harter Act, reversed. This act specially provides that if the company shall have used due care and diligence in seeing that the ship was properly manned and equipped, and in every respect seaworthy when it left port, it would not be responsible for the negligence of the master or any officer connected with the ship.

It is not necessary to go into the question of general average.

We think there was error in the finding of the court below on matters of law, and the Harter Act in this case applies.

It is therefore ordered, adjudged and decreed that the judgment of the court below be set aside and that the case be dismissed from the docket.

Let this be certified to the District Court, Division of Cristobal.

Reversed.

MORALES, Executor, *versus* THE PANAMA BANKING
COMPANY.

No. 135. Argued May 19, 1914. Decided June 20, 1914.

HEARSAY EVIDENCE. LEADING QUESTIONS.

Hearsay evidence as a general rule is inadmissible, but an admission made by one against his interest is often admitted and is an exception to this rule.

Errors committed during the trial which are immaterial and do not affect the real rights of parties litigant will not be noticed by an appellate court.

DEPOSITIONS.

Definite notice of some character to opposite party is always a prerequisite to the validity of a deposition.

Appeal from the Circuit Court of the Third Judicial Circuit;
Hon. Thomas E. Brown, Jr., Judge.

The facts appear in the opinion.

Harmodio Arias, for appellant. *Hinckley* and *Ganson*, and *Fairman*, *MacIntyre* and *Enderton*, for appellee.

GUDGER, C., J. On the 31st day of October, 1913, J. B. Schuetz, a resident of Gatun, Canal Zone, died at the Colon Hospital. Shortly thereafter this plaintiff duly qualified as the administrator of his estate.

The deceased had, during his lifetime, been a depositor in the defendant bank and this suit is to recover a balance of five thousand (\$5,000) dollars claimed to be due and owing to the estate. The complaint contains three counts.

The first alleges that the defendant received certain amounts on deposit and that of this sum there is a balance of five thousand (\$5,000) dollars due the estate which has not been paid either to the deceased or to the administrator. The second alleges practically the fact set forth above and in addition recites that the bank paid this amount without authority to some party or

parties unknown to the plaintiff, and without the consent of either the administrator or the deceased. The third reiterates the first and second and, in addition, alleges that the said five thousand dollars was paid on a forged check, purporting to have been signed and endorsed by the deceased, and that the bank knew, or could have by due diligence ascertained, the true facts with regard to said forgery. The alleged forged check is offered and received as a proper exhibit. The prayer was for a judgment in the sum of five thousand (\$5,000) dollars.

To this complaint the defendant entered a demurrer on the ground that the complaint was "ambiguous, unintelligent and uncertain," which demurrer the court overruled and exceptions were duly noted. The defendant then filed his answer and the trial was proceeded with.

In support of the contention of the plaintiff, expert evidence was introduced on handwriting; evidence of those who professed to be familiar with the handwriting of the deceased; evidence of the sickness of the deceased at the time the check was alleged to have been cashed, and the rules of the bank as to requiring those who presented checks to endorse the same. These witnesses established, to say the least, a *prima facie* case in favor of the plaintiff, and the defendant, having no testimony in the record, must rely for reversal on errors in the ruling of the court during the course of the trial. A judgment for the sum of five thousand (\$5,000) dollars in favor of the plaintiff was rendered and from this, appeal was taken to this court.

The gravamen of the complaint, taking either of the causes of action or all of them combined, is the failure to account for the five thousand dollars claimed to be due the plaintiff. If these separate causes of action are taken collectively they amount to an allegation that defendant received five thousand (\$5,000) dollars of the deceased's money that has not been accounted for; that it paid it out to someone not known to the plaintiff and without the knowledge or written consent of the plaintiff or those whom he represents, and that this was done on a forged check.

In the demurrer it is stated that this language is "ambiguous, unintelligent and uncertain." If language could be more certain or definite, it is hard to conceive what words could be used to make it so.

The second exception is with regard to an application filed to take the testimony of a certain witness in the city of New York.

It will be seen from the record that not only was the testimony of this witness desired, but that in addition the application carried with it the demand to select from the papers on file in the court the check alleged to have been forged, and to forward that together with signatures of the deceased admitted to be genuine, in order that the witness might pass on these as an expert. It is apparent that the testimony of this witness could not have been taken without sending the check as requested by the attorney of the defendant. This check was not the property of the court, nor the property of the defendant, nor indeed was it the property of the plaintiff in the true sense of the term. It was a court paper and as such must remain among the files of the office, and the defendant had no inherent right to command its presence in New York City. Indeed it was the foundation of the action and the court would have been in error if it had assumed that it had the power to send it without the jurisdiction of the court.

The third exception is with regard to certain records kept at the Colon Hospital and which were introduced in evidence. We can see no good reason as to why these records should not have been admitted, and especially so in view of the fact that there was other testimony showing that about the time that the draft alleged to have been forged was dated, the deceased was in a very weak condition and had to be propped up in bed in order to sign his name to a paper.

The fourth exception is to the evidence of the manager of the bank, which the attorney terms "hearsay." It is well settled that "hearsay evidence" as a rule is inadmissible. However, admissions made by parties against their interest are often admitted and these perhaps form an exception to the general rule. It appears that the manager, together with certain Canal Zone officials, went to the police station and court house in Cristobal for the purpose of examining into this alleged forged check, and that the manager was in full charge of the business of the defendant. While so acting, it is alleged that he made the statement excepted to. This statement amounts to very little and would not be sufficient to justify reversal even though it should be otherwise objectionable. However, considering the capacity in which the manager acted, it would appear that what he did and what he said was within the full scope of his authority.

Fifth, the witness Rochelle was asked by defendant's counsel his reasons for saying that he did not think the signature to the check in question was the signature of the deceased. This was

objected to and excluded by the court. This witness had already stated that he knew the deceased in the Philippine Islands for a long period of time; that he often saw him write his name; that since he had been on the Canal Zone, deceased was under him as a policeman for nine months, and during that time he often saw him write his name and make out his reports, and that he was familiar with his signature; and that he, the witness, had been the manager of the deceased's place for some months prior to his death and in that capacity had seen much of his writing and signatures, and, in addition to this, stated on cross-examination the months he had seen these signatures of the deceased, and finally was asked the question which was objected to.

While we can see no reason to conclude that the court was in error in excluding this question under the circumstances, it is not necessary that we should pass on the same for the reason that during the course of the trial the witness was recalled to the stand and the judge offered the attorney for the defendant an opportunity to ask and receive an answer to the question if he so desired. The attorney did not avail himself of this. Having been offered this opportunity, he is estopped from making any point with regard to the matter.

Sixth, the defendant placed on the stand a witness by the name of Roberts and asked him if he was the official interpreter in Colon. Referring to a document, asked him if that was the signature, and both being answered in the affirmative, the attorney asked "Would you kindly state what this document is?" This was objected to and the objection was sustained. At this point the defendant's attorney stated to the court that he tendered the document in evidence, saying it was a deposition of Charles George Cleel, taken before the First Circuit Judge of Colon on the 18th day of January, 1913.

Attorney for the plaintiff objected to this for the reason, as he stated, that there was nothing to show that the plaintiff had received notice of the taking of such testimony. This objection was sustained by the court and exceptions noted.

There is nothing in the record to show what this document was or what it contained. Ordinarily a deposition must speak for itself and it can not be concluded that any deposition taken without notice to those interested, can be offered and received in evidence in any court of the Canal Zone. It seems to have been admitted that plaintiffs had not been given notice. The document

is not noted in the record and we can not, therefore, say anything more than the above.

It may be well, at this point, to say that mere errors committed during the trial which are immaterial and which do not affect the real rights of the parties to the suit, will not generally be noticed by an appellate court. This has reference to the objection with regard to leading questions.

In our opinion there was no error committed in this case that justifies a reversal, and the judgment of the lower court is therefore affirmed.

Let this be certified in the District Court, Division of Cristobal.
Affirmed.

PANAMA DEVELOPMENT AND MANUFACTURING CO.,
versus LAM HING & CO.

No. 139. Argued, June 10, 1914. Decided, June 20, 1914.

JURISDICTION.

Jurisdiction of the subject matter of an action is not waived by the filing of an answer and proceeding to trial on the merits. A plea that the court has no jurisdiction over the subject matter can be raised at any time, even in a court of last resort.

Where both the parties, plaintiff and defendant, are alien nonresidents of the Canal Zone, and the contract for the breach of which suit was brought was executed without the territorial limits of the Canal Zone, relating to matters to be performed in a foreign jurisdiction, the courts of the Canal Zone would, upon principle of policy, if not from lack of jurisdiction, be loath to assume jurisdiction.

Appeal from the Circuit Court of the Third Judicial Circuit;
Hon. Thomas E. Brown, Jr., Judge.

The facts appear in the opinion.

Harmodio Arias, for appellant. *W. C. Todd* and *V. G. de Suze*, for appellees.

JACKSON, J. This case comes into this court on an appeal from the judgment of the Third Circuit in the sum of \$40,000 United States currency, in favor of the plaintiff and against the defendant.

The controversy arises out of a contract entered into between the parties in the city of Colon, R. P., on the 9th day of Janu-

ary, 1913, and a consideration of the provisions of said contract is of vital importance to the determination of the questions involved herein.

The first paragraph thereof recognizes an indebtedness of the plaintiff to the defendant in the sum of \$51,264.94, and the plaintiff binds itself to pay as interest on said sum, 1 per centum per month upon said amount. In paragraph "3d" it is provided that the Panama Development and Manufacturing Co., for the purpose of guaranteeing the payment of the amount set forth, and which it owed to the house of Lam Hing & Co., makes in favor of said house certain mortgages upon its distillation and milling industrial establishments with all the appurtenances thereunto belonging, situated within the limits of the "Cativa Plantation," and also upon certain leasehold rights of certain lots of the plaintiff company situated in the city of Colon, and also upon certain houses built upon said lots.

In paragraph "4th" of said contract it is provided that the Panama Development and Manufacturing Co., makes actual delivery to Lam Hing & Co., of the sugar cane plantation of Cativa, together with the distillation and milling industrial establishments connected therewith, and also all the fixtures, utensils, track, and transportation equipment and other appurtenances suitable for the working thereof, in order that out of the proceeds, said Lam Hing & Co., may pay themselves the amounts owing them, viz: the sum of \$51,264.94, and interest thereon at the rate of 1 per cent per month.

Paragraph "5th" authorizes Lam Hing & Co., to make new installations, acquire new stills, evaporators, sugar mills, and make all the improvements necessary with the object of increasing the proceeds of the plantation; the installations, machinery, improvements, etc., to belong to the company.

Lam Hing & Co. took possession of the premises consisting of about 450 acres, more or less, of growing cane, on the said 9th day of January, 1913, and proceeded to operate the sugar cane plantation pursuant to said contract, up to the filing of this suit in October, 1913. No specific time is fixed in the contract for its termination. Paragraph "8," however, provides as follows:

It is understood and agreed that if by the 31st of December, 1913, Lam Hing & Co. shall not have been reimbursed the amount with the proceeds from the plantation and the payments on account which the Panama Development and Manufacturing Company acknowledges as owing to the firm by this instrument, the firm may enforce the payment of the amounts owing it through the legal channels or by any means which it may deem proper.

This would seem to contemplate that the right to possess, occupy and manage the property mortgaged to Lam Hing & Co. and to receive the proceeds thereof (applying the same to the liquidation of the indebtedness acknowledged in the instrument), was to continue until such time as Lam Hing & Co. should be fully reimbursed for such original indebtedness, the interest thereon, and the amount of their expenses in the operation of the plantation. In other words, paragraph "8" does not provide that the contract shall terminate on the 31st of December, 1913, unless Lam Hing & Co. might by that time have been fully reimbursed, but it would seem to provide that until such date, Lam Hing & Co. could not sue the plaintiff company for the enforcement of the acknowledged indebtedness. Under paragraph "8" it would seem clear that the rights of Lam Hing & Co. to continue as the mortgagee in possession until fully reimbursed for the indebtedness is clearly recognized by the contract.

However, before said date of December 31, 1913, viz: in October, 1913, the plaintiff company instituted an action against Lam Hing & Co. or Won Lam in the Third Judicial Circuit at Cristobal wherein it was alleged, among other things, that the said Won Lam or Lam Hing & Co., defendants, his servants and agents, had harvested and gathered large quantities of growing sugar cane and corn from the premises in question, and from said cane made and distilled great quantities of rum and sold the said rum and corn at highly favorable market prices; but that in utter disregard of the terms of the aforementioned contract and agreement, the said defendants, their agents and servants had refused and failed to comply with the terms of said agreement, and had violated and continued to so violate each and all of the terms thereof.

Also it is alleged that proper books of account of the income and expenditures of said plantation were not kept, but on the contrary the defendants and certain of their agents fraudulently conspired together to falsify and pad the said accounts, and evidence thereof, and did falsify and pad the same by including therein numerous items and amounts, and did fraudulently appropriate the moneys thereby acquired to their use to the extent of \$50,000 United States currency.

Further, it is alleged that from the sale of rum and corn aforesaid, the defendants have been fully paid off, the indebtedness referred to in the aforementioned contract, but, notwithstanding, they still retain the possession of said plantation and the opera-

tion and administration thereof and withhold from the plaintiff just and true accounts of the income and expenditures, and further that the said defendants have purposely and wantonly allowed said plantation to lie idle and have otherwise committed acts of waste and ruin thereon. It is alleged that by reason thereof the defendants are indebted to the plaintiffs in the sum of \$100,500, United States currency, over and above the recognized indebtedness due the defendants, together with interest thereon and the costs of the operation of the plantation. Therefore, plaintiff prays for judgment for that amount and also for the rescission of the aforementioned contract.

The complaint discloses that the plaintiff is a corporation of the Republic of Panama; that the defendants are all citizens and subjects of Panama; that the contract was made in the Republic of Panama and was to be wholly executed therein. And, predicated upon these facts, the defendant filed a plea to the jurisdiction of the court, which plea was overruled and exception noted. Thereafter the defendant filed his answer which was, in substance, a general denial of all allegations except the indebtedness of the plaintiff to the defendant, the mortgage, the contract and the possession and operation of the sugar cane plantation; and said answer further alleged that defendants had not been paid the full amount of the indebtedness resulting from the agreement, there being a balance due him of \$80,000 United States currency.

After a lengthy trial resulting in a voluminous record, the court declined to grant the prayer of the plaintiff for a rescission of the contract, stating that it would not have jurisdiction in any event to rescind the same. However, the court proceeded to find for the plaintiff and rendered a judgment in its favor against the defendant in the sum of \$40,000, together with costs.

The defendant is here on a number of assignments of error:

1. That the court erred in overruling defendants' plea to the jurisdiction of the court.

2. That the action is not instituted in the name of the proper party, it being claimed the action is brought by Col. Frank Morgan as attorney in fact for the corporation instead of by the company itself.

3. That the judgment is contrary to the evidence and manifestly against the weight of the evidence.

4. That the judgment is contrary to law.

5. That the court erred in overruling the motion of the defendant to dismiss at the conclusion of plaintiff's case.

6 and 7. For alleged errors of the court as to the admission and rejection of evidence at the trial of the case.

The first assignment raises the all-important question that the trial court was without jurisdiction of the subject matter of the action, which, if this be so, must determine the case, for it is well established that jurisdiction of the subject matter as distinguished from jurisdiction of the person is not waived by the defendant's filing his answer and going to trial. Such objection can be raised at any time, even for the first time in the court of last resort.

The defendant's theory is that this is a local action as distinguished from a transitory one, and that it must, therefore, be brought in the jurisdiction where the property is situated, and especially so in view of the fact that not only is the property situated wholly in the Republic of Panama, but the contract was executed in said Republic and was intended to be performed wholly therein and also that all parties, plaintiffs and defendants, are citizens and residents of the Republic of Panama.

The defendant recites and relies largely upon the provisions of section 393 of the Code of Civil Procedure of the Canal Zone, as follows:

VENUE OF ACTIONS—Actions to confirm titles to real estate or to secure a partition of real estate, or to cancel clouds or remove doubts from the titles of real estate, or to obtain possession of real estate, or to recover damages for injuries to real estate, or to establish any interest, right, or title in or to real estate, or actions for the condemnation of real estate for public use, shall be brought in the judicial circuit where the land, or some part thereof, is situated * * *

It is also contended that this is declaratory of the well-recognized rule of law prevailing in England and generally throughout the United States.

The theory of plaintiffs, as stated in their brief, is that the action is transitory, not local; that it was predicated upon a contract between plaintiff and defendant, which by its terms, made the defendants the trustees of the plaintiff company and that by reason of the wilful and fraudulent violation of the terms of said contract by said trustees, their agents and servants, this action arose. Hence they claim to have a contract, trust and fraud. Consequently they claim the action is transitory and not local, although it may incidentally or collaterally affect land or an interest therein lying in a foreign jurisdiction. As a transitory action they claim the right to sue in the courts of the Canal Zone by virtue of the fact that defendant had certain property therein

subject to attachment, and the plaintiff relies in support of such right, upon the Executive Order of July 28th, 1910, as follows:

SECTION 1. No civil action or special proceeding shall be brought or proceeded with in the courts of the Canal Zone, in any case in which both the parties, plaintiff and defendant, are alien nonresidents of the Canal Zone, and the cause of action is one which arose without the territorial limits of the Canal Zone Government, and the party proceeded against has no property within said territorial limits, subject to the jurisdiction of the Canal Zone courts.

It will be noted that while the Executive Order provides negatively that no civil action shall be brought in the courts of the Canal Zone in which both parties, plaintiff and defendant, are alien nonresidents of the Canal Zone, and the cause of action is one which arose without the territorial limits of the Canal Zone Government, and the party proceeded against has no property within said territorial limits, that it does not affirmatively provide the converse thereof, viz: that *any* civil action may be brought in the Canal Zone courts where the parties are alien nonresidents and the cause of action arose without the territorial limits of the Canal Zone, provided the party proceeded against has property within the said territorial limits subject to the jurisdiction of the Canal Zone courts. In other words, it was not intended by this provision to extend to the Canal Zone courts a jurisdiction of local actions which it did not otherwise possess.

And, in the consideration of transitory actions arising upon contracts made and to be performed without the jurisdiction of the Canal Zone, this court has, in previous cases, viz: *Blue vs. Panama Timber Co.*, and *Canavaggio vs. Habib & Co.*, sustained the jurisdiction upon the finding of fact that one of the parties in each of such actions was actually resident and domiciled in the Canal Zone and that they had property situated therein.

The paramount question for consideration here, is, whether this is a local as distinguished from a transitory action. If so, it must be held that the court was without jurisdiction in the premises.

Looking at the contract in all of its relations between the plaintiff corporation and the defendant company, it would seem clear that a mortgage was given by the former to the latter, as likewise the right of possession and operation of the premises covered by the mortgage until such time as the indebtedness secured thereby together with all operating expenses, should be liquidated; and that this gave to the defendant company a substantial interest and right in and to the premises and the possession and enjoyment thereof.

It would seem, therefore, that the finding of the court that the indebtedness of the plaintiff to the defendant had been fully liquidated, leaving a counter indebtedness of \$40,000 against the defendant, would amount to a finding that the defendant no longer had any right, title or interest in and to the premises in question, which as before stated, are situated wholly within the Republic of Panama. The court below in its opinion stated that it would not have jurisdiction in any event to rescind the contract between the parties, in which conclusion we fully concur, but its finding that the indebtedness to the defendant had been fully satisfied and that on the other hand the defendant owed the plaintiff the sum of \$40,000, we think, in legal intendment and effect, would amount to a rescission by any court having competent jurisdiction. In fact such finding of an indebtedness against the mortgagee in possession could properly arise only by way of an accounting between the mortgagor and mortgagee after a rescission of the contract.

If, therefore, the judgments of our courts are to receive full force and credit and to import verity in the courts of our sister Republic of Panama, this finding and judgment of the court below would amount to a finding as to the defendant's right and interest in and to the property in question. This would make it not only a local action as generally understood, but one clearly prohibited by section 393 from being maintained in our courts.

But, moreover, the complaint asks damages against the defendant, predicated in part at least upon the allegations of acts of waste committed and ruin permitted upon the premises in question and the court in its judgment finds, as a matter of fact, that the defendants, through their agents and servants, "deliberately set out by means of fraud, intimidation and waste, to obtain permanent possession of the Cativa Plantation. He failed to keep correct statements of sales of rum. He wasted and destroyed cane."

It must, therefore, be assumed that the court below in arriving at its judgment of \$40,000 against the defendant, had in mind a considerable element of waste committed by the defendant upon the premises; and section 393, before cited, would seem to expressly preclude the courts of the Canal Zone from taking jurisdiction to recover damages for injuries to real estate situated in a foreign jurisdiction.

But plaintiff contends that such provision as to injury to real estate relates only to the jurisdiction as established and defined

between the judicial circuits of the Canal Zone, and that it was not intended to apply to suits for waste committed upon real estate in a foreign jurisdiction. In support of this contention, counsel for plaintiff cites the case of *Little vs. Chicago, St. Paul, Milwaukee & Omaha Railway Co.*, 33 L. R. A., 423, which holds as follows:

An action will lie in this State to recover damages for injuries to land situate in another State.

Such an action is purely personal in its nature, the reparation being purely personal, and for damages.

The statute of this State that actions for injuries to real estate must be brought in the county where the subject of the action is situated only applies to causes of action arising within the State.

But in the consideration of this case it is conceded by the court their holding in this respect is contrary to the general weight of authority in the United States, and the able dissenting opinion therein, which cites and reviews a long list of American decisions, would seem to more clearly state the rule of law as we understand it. Aside from the citations of authorities, the argument of the dissenting opinion is, to our minds, cogent and convincing. We quote as follows:

As a matter of policy, citizens of other States should not be permitted the use of our courts to redress wrongs and injuries to real property committed within their own territory. That is not what our courts were created or organized for. Nonresidents should not be invited to bring to our courts litigation arising over injuries to real property outside of our territorial limits. Certainly there is nothing in our constitution or laws which justifies them in imposing the burden of maintaining courts at our expense for their use and benefit. Protection of our own citizens is the primary object and duty of our courts, and it is, to say the least, a very generous and liberal interpretation of the law which accords the suitors residing in other States the right to litigate in our courts questions of injury to real estate there situate, while the courts of those States reject the claim of our own citizens to litigate there injury to real estate here * * *

The same doctrine is held in practically all States of the Union. We quote from *Dodge vs. Colby*, 108 N. Y., 449 as follows:

The doctrine that the courts of this State have no jurisdiction of actions for trespass upon lands situated in other States is too well settled to admit of discussion or dispute * * *. The claim urged by the plaintiff that if not permitted to maintain this action he is without remedy for a most serious injury, is quite groundless, and affords no reason for the assumption of a jurisdiction by this court which it does not possess * * *.

But even if this were a transitory action as distinguished from one purely local, we think the court should be slow to assume jurisdiction thereof upon the broad question of policy. The decisions

in the cases of *Blue vs. the Timber Co.*, and *Canavaggio vs. Habib & Co.* do not lay down any principles that would require the assumption of jurisdiction in the present case, because, as stated, one of the parties in each of those cases was domiciled at the Hotel Tivoli and therefore a resident of the Canal Zone although doing business in the Republic of Panama and, moreover, they had property in the Canal Zone subject to the jurisdiction of this court.

But here we have a case where both parties, plaintiff and defendant, are citizens and residents of the Republic of Panama, where the contract was made in Panama to be fully executed therein, and the subject matter thereof situated wholly within the territorial limits of Panama. Aside from the question of the doubtfulness of the ability of our courts to do perfect justice to all parties under such circumstances, it may be said that as a question of policy, the parties, under such circumstances should be left to litigate their claims in their own courts, in the jurisdiction where the contract was made, where the property was situated and where the contract was intended to be performed.

Such a principle was announced by the Supreme Court of Texas in the case of *Mexican National Railroad Co., vs. Jackson*, 31 L. R. A., 276, which was an action to recover for personal injuries received in Mexico, the action for personal injuries being of course, a purely transitory one. The reason stated by the Supreme Court of Texas for declining to take jurisdiction in that case apply forcibly to the case at bar. There the court said:

There are other sufficient reasons why our courts should not attempt to enforce the Mexican law in cases like this. The reason which influences the courts of one State to permit transitory actions for torts to be maintained therein, when the right accrued in a foreign State or country, is that the defendant, having removed from such other State or country, can not be subjected to the jurisdiction of the courts where the cause of action arose, and, as matter of comity but more especially to promote justice, the courts of the place where he is found will enforce the rights of the injured party against him, because it would be unjust that the wrongdoer should be permitted, by removing from the country where he inflicted the injury, to avoid reparation for the wrong done by him. In this case there has been no removal of the person or property of the defendant. Its railroad remains, as it was at the time of the injury, within the jurisdiction of the courts of Mexico, and it is liable to suit there according to the laws of that country. The reason for permitting the action to be prosecuted in our courts does not obtain in this case. The plaintiff has voluntarily resorted to the jurisdiction of our courts, when his rights could be better adjudicated in Mexico. * * *. Thus it becomes a matter of public concern, and a proper subject for our consideration in this connection, in view of the fact that the railroad company is still subject to that jurisdiction.

Justice does not demand the exercise of the jurisdiction, and comity between the governments of this State and Mexico would seem to forbid that we should do so * * * . If our courts assume to adjust the rights of parties against those railroads, growing out of such facts as in this case, we will offer an invitation to all such persons who might prefer to resort to tribunals in which the rules of procedure are more certainly fixed, and the trial by jury secured, to seek the courts of this State to enforce their claims. Thus we would add to the already overburdened condition of our dockets in all the courts, and thereby make the settlement of rights originating outside the State under the laws of a different government a charge upon our own people. If the facts showed that this was necessary in order to secure justice and the laws were such as we could properly enforce, this consideration would have but little weight; but we feel that it is entitled to be considered where the plaintiff chooses this jurisdiction as a matter of convenience, and not of necessity.

While not attempting in this opinion to lay down a rule for the guidance of all jurisdictional questions for determination hereafter arising in transitory actions that may be brought in the courts of the Canal Zone by citizens and subjects of Panama or other foreign jurisdictions against other foreign citizens and residents upon foreign contracts or rights arising in foreign jurisdictions, we think that the principles announced in the cases of *Little vs. C., St. P., M. & O. Ry.* and *Mexican National R. R. vs. Jackson* ought to serve to a great extent as a guide, and that the assumption of jurisdiction in such cases should be closely and carefully scrutinized. In so stating we are satisfied that the courts of the Republic of Panama would, under like circumstances, be guided by similar considerations; that is, that in an action arising wholly between citizens of the United States, resident and domiciled in the Canal Zone, upon a contract or cause of action made or arising in the Canal Zone and relating to matters to be performed wholly within the Canal Zone, the courts of the Republic of Panama would, upon principles of policy, if not from lack of jurisdiction, be loath to assume jurisdiction of such causes.

The conclusion thus reached makes it unnecessary to consider the other assignments of error.

For the reasons stated our holding is that the court below was without jurisdiction of the subject matter, and it therefore follows that the case must be reversed and the plea to the jurisdiction of the court sustained, with all costs to the defendants.

Reversed.

LIPSCOMB *versus* SAMUDIO PLANTATION SYNDICATE.

No. 142. Argued May 20, 1914. Decided June 16, 1914.

APPEAL. BILL OF EXCEPTIONS.

Right to appeal and to perfect a bill of exceptions is purely statutory and such a right is, therefore, strictly limited by the terms of the statute.

Appeal from the Circuit Court of the Second Judicial Circuit;
Hon. William H. Jackson, Judge.

The facts appear in the opinion.

W. C. MacIntyre, for appellant. *E. M. Robinson*, for appellee.

BROWN, J. This cause came on for hearing by this court on a motion to dismiss the bill of exceptions filed herein.

Judgment in favor of the respondent, plaintiff below, was rendered by the Second Circuit Court on the 27th day of March, 1914. Upon rendition of said judgment the defendant gave notice of appeal to this court. Whereupon without the consent of the plaintiff and against his objection, the court extended the time for perfecting the bill of exceptions to thirty days from said March 27, 1914. The extended term of thirty days expired April 26, 1914. On April 27, 1914, on the application of respondent the clerk of the Second Circuit Court and the judge thereof, issued their respective certificates to the effect that no bill of exceptions had been filed in said cause and that the judgment therein described was a final judgment. Such certificates, after due proceedings, were filed of record as public instruments in the Registrar's office in the City of Panama, Republic of Panama. Thereafter without notice to the respondent the time to file the bill of exceptions was again extended and on the 30th day of April, 1914, the bill of exceptions was approved and signed by the judge of the court below without any opportunity being given to the appellant to appear and either approve or contest the statement of facts contained therein. On the same day the bill of exceptions was filed in this court, said day, viz., April 30, 1914, being the last day on which bills of exceptions could be filed prior to this court's adjournment *sine die*.

On this statement of facts the plaintiff-respondent prays that the bill of exceptions be dismissed.

The right of appeal and the right to perfect a bill of exceptions are both purely statutory. Such rights are, therefore, strictly limited by terms of the statutes which give rise to them. In the Canal Zone the right to perfect a bill of exceptions is determined by the provisions of section 136 of the Code of Civil Procedure. That section provides, among other things, that the party desiring to prosecute the bill of exceptions shall so inform the court at the time of the rendition of final judgment, or so soon thereafter as may be practicable and before the ending of the term of court at which final judgment is rendered, and thereupon a memorandum to that effect shall be made upon the judge's minutes and the docket of the court. The section further provides in effect that within ten days after the entry of the memorandum aforesaid the proposed bill of exceptions shall be tendered to the judge who shall, after reasonable notice to both parties and within five days from the presentation of the bill of exceptions, restate the facts and the exceptions, if either need restating, and certify same for filing same in this court.

Section 136, like the sections of other codes relating to appeals and the perfecting of bills of exceptions, is mandatory in its provisions. If its terms had been strictly followed in this action the time for appellant to present his bill of exceptions to the judge of the court below would have expired on April 6, 1914, unless extended by consent of the plaintiff-respondent. It is, however, a fact that it has never been the practice in the Circuit Courts of the Canal Zone to enforce the provisions of section 136 strictly, nor have counsel for parties to actions insisted on a strict enforcement. This is the first time that any party to an action has asked this court to protect his rights in accordance with the terms and provisions of said section. Notwithstanding the looseness of practice in this regard it is nevertheless true that neither custom nor the will of the courts can alter, enlarge, or extend the provisions of statutes relating to appeals or to the perfecting of bills of exceptions.

The law which seems to prevail in all jurisdictions having such statutes is well stated in the case of "*The American Tobacco Company vs. Strickling*" decided by Maryland Court of Appeals and reported in 88 Md., 500: 69 L. R. A., 909." In that case a verdict was rendered against the tobacco company on April 4, 1908. The Maryland statute required that the bill of exceptions should be signed within thirty days from the rendition of verdict. The thirty days expired on May 4, 1908, which fell on a Sunday. Upon the following day, Monday, May 5, 1908, the trial court

made an order extending the time for signing the bill of exceptions and the bill was signed on the same day. The appellate court said

There was no consent of the parties, and the order extending the time of signing was passed after the expiration of 30 days from the rendition of the verdict, if Sundays be included. It is contended, however, that Sundays should be excluded, and that the statute means 30 working or judicial days. But with that contention we can not agree. If there had been error in the rulings of the court below, it might have seemed a hardship that the appellant should have lost his right of appeal by being one day too late; but neither this court nor the court below can disregard the plain language of the statute, and we have had occasion to speak more than once of the importance and necessity of having bills of exceptions signed promptly * * *. As neither the bill of exceptions, nor the order extending the time was signed within 30 days from the rendition of the verdict, the motion to dismiss the appeal must prevail.

In this cause before us it may be seen from our statement of the facts relating to the extension of time, etc., that no attempt was made to comply with the provisions of section 136 of the Code of Civil Procedure. It is proper for us to say, therefore, that while it may be a hardship for appellant to thus lose his right of appeal, that hardship can not make it right for this court "to disregard the plain language" of a code provision. The motion to dismiss must therefore prevail.

It is ordered that the bill of exceptions be and same hereby is dismissed without costs.

Affirmed.

EWAR JEANETTE *versus* ESTATE OF GEORGE
ANDRADE.

No. 133. Submitted June 11, 1914. Decided June 20, 1914.

WEIGHT OF EVIDENCE.

It is not the province of the Supreme Court to reverse a case on the facts unless the findings of the trial court were plainly and manifestly against the weight of the evidence.

Appeal from the Circuit Court of the Second Judicial Circuit;
Hon. William H. Jackson, Judge.

The facts appear in the opinion.

V. E. Bruno, for appellant. *W. H. Carrington*, for appellee.

GUDGER, C. J. It appears that George Andrade leased from the United States Government certain real property and placed in possession of the same one Leon Anatole Jeanette under contract to share in the proceeds arising from the said property from year to year. That said agreement or copartnership had existed for some years and was fulfilled until the lease of Andrade was cancelled by the Government because of the land's being in the lake area of the Canal.

The Government was held liable for such improvements as had been placed on the property during the life of the lease. No settlement could be effected between the Government and the parties as to these improvements and therefore the question was submitted to and passed upon by the Joint Land Commission and an award made for the sum of \$1,020.

The evidence is not clear as to some of the improvements but as to the largest and best house built on the property, it is expressly proved that the expenses of the same were borne by Jeanette, while the two smaller houses were built at the expense of Andrade. As regards the clearing, planting of crops, trees, etc., there is nothing direct, but the inference is that this was done out of the net proceeds arising from year to year.

The application was made to the Joint Commission in the name of Andrade with an agreement that whatever might be awarded, one-half would be paid to Jeanette.

The court below found that a copartnership existed and gave judgment in favor of the plaintiff for the sum of \$408 the same being the net sum after deducting certain necessary expenses incurred before the Joint Land Commission. The facts as proved sustain the contention of the plaintiff that a partnership existed between the representatives of the plaintiff and defendant and there was, therefore, no error in the holding of the court below.

The judgment of the lower court is in all respects affirmed. Let this be certified.

Affirmed.

IN re PETITION OF JULIAN ANDRADE to intervene in the
ESTATE OF GEORGE ANDRADE, deceased.

No. 137. Argued May 27, 1914. Decided June 20, 1914.

ADOPTION.

The question of adoption of minor children is statutory, and such statutes must be strictly adhered to. An entry of such facts made by a parochial priest in his books is not in accordance with statutes and will therefore have no effect.

Appeal from the Circuit Court of the Second Judicial Circuit;
Hon. William H. Jackson, Judge.

The facts appear in the opinion.

Valentine E. Bruno, for petitioner, appellant. *Hinckley and Ganson*, for administrator, appellee.

GUDGER, C. J. This action is in the nature of an intervention by the petitioner in the estate of George Andrade, deceased, alleging that he, the petitioner, is the adopted son of the deceased and asking to be recognized as an heir and that an order be made to allow him his proper distributive share.

He bases this claim on the fact that in the year 1902 when George Andrade married his mother an entry was made in the parochial books by the priest who performed the marriage ceremony, that it was made manifest that he, George Andrade, recognized petitioner as his son and that from then until the death of the said Andrade, some two years ago, he lived continuously in the family, took the name of Andrade and was treated in every respect as a member of the family. The evidence shows that petitioner was not the carnal son of George Andrade.

The Circuit Court, after hearing all the facts, rendered a verdict disallowing the petition, from which an appeal was taken to this court.

The question of adoption of minor children and making them heirs is governed by statutes. The special articles of the Civil Code referring to this matter are as follows:

ARTICLE 279: For the adoption it is necessary in every case that the permission of the judge or prefect of the domicile of the adopted be first secured. If the person adopted should be under age, or a person reputed a minor, the judge shall, in addition to the measure prescribed in the foregoing article

take such other measure as he may consider necessary for the benefit of the person adopted, and for the security of his property.

ARTICLE 280: After the judicial permission shall have been obtained the proper instrument shall be prepared before the respective notary, without which the adoption shall be without effect. This instrument shall be signed by the judge granting the permission, the adopter, the adopted, and, in a proper case, also by the person who granted permission for the adoption, the notary and two witnesses authenticating it.

In the case before us there is no claim that these articles, mandatory in their terms, have been complied with. In 1 Cyc. 919 we find the following:

A statute providing a mode for adoption implies that it can not be done legally in any other way, and in order to effect an adoption there must be a substantial compliance with all the essential requirements of the law under which the right is claimed.

and in the case of *Ferguson vs. Jones*, 3 L. R. A., 420, the following:

A child for adoption can not inherit from the parent by adoption, unless the act of adoption has been done in strict accordance with the statute. The right of adoption was unknown to the common law and was repugnant to its principles. Such right being in derogation of the common law, is a special power conferred by statute, and the rule is that such statute must be strictly construed.

As the proper procedure prescribed by law was not followed and as the entry made by the parochial priest was a private entry not in accordance with the statutes, the court below did not err in the decision rendered and the judgment of that court is therefore confirmed.

Let this be certified.

Affirmed.

CANAL ZONE *versus* FRANCISCO FRAER.

No. 141. Argued May 27, 1914. Decided June 9, 1914.

WEIGHT OF EVIDENCE.

It is not the province of the Supreme Court to reverse a case on the facts unless the findings of the trial court were plainly and manifestly against the weight of the evidence.

Appeal from the Circuit Court of the First Judicial Circuit;
Hon. H. A. Gudger, Judge.

The facts appear in the opinion.

Hall and Van Dame, for appellant. *Charles R. Williams*, for the Canal Zone.

BROWN, J. The defendant was charged with the offense of grand larceny and was tried and convicted of said offense in the Circuit Court of the First Judicial Circuit. His appeal to this court presents no important question of law for our consideration, but it is claimed that the facts proved in the lower court were not sufficient to sustain a verdict of guilty.

The information charged that:

Francisco Fraer, on the 17th day of February, 1914, did then and there wilfully, unlawfully, and feloniously steal, take, and carry away from the person of Henry Nurse, from his pocket, twenty Panamanian fifty-cent pieces of the value of \$5 United States currency, property of the said Henry Nurse, etc.

Larceny from the person of anything of value is made grand larceny by the Penal Code of the Canal Zone.

At the trial in the court below evidence was introduced to the following effect: That on the 17th day of February, 1914, at about 6.30 p. m., the complainant, Nurse, was standing at the counter in the Balboa commissary, waiting for goods he had purchased; that he had in his hip pocket twenty 50-cent pieces of Panamanian silver; that he felt a tug at his hip pocket where he had the money and that he turned around to see who was behind him and saw the defendant, but the money was still in his pocket; that a few seconds later he felt another tug at his pocket containing the money, and he put his hand upon his pocket and missed the money and turned around quickly and defendant was standing immediately behind him; that others were standing around, but not immediately behind him and not near enough to have taken his money; that he accused the defendant of taking the money and the defendant denied it; that the manager of the commissary heard the conversation and came to where the complainant was standing and asked him the trouble, and he told the manager that the defendant had robbed him of twenty Panamanian 50-cent pieces; that the manager then searched the defendant and found twenty-two Panamanian 50-cent pieces loose in his pocket; that the defendant was arrested.

Defendant testified that previous to this date he had cashed his pay check, and that he had in his possession twenty Panamanian 50-cent pieces of his own money, and that it was a mere coincidence that the two sums so nearly agreed, and that he did not take the money of the defendant.

The mere statement of the facts in evidence would seem to show that there was sufficient evidence to justify the verdict but the defendant insists that there was no evidence of the identity of the money found in defendant's possession with that alleged to have been stolen.

It is true as a proposition of law that where money has been stolen and money similar in kind is found in a defendant's possession soon after the theft, identity of the latter with the stolen money must be proved before conviction can properly be predicated upon such possession. But the proof of identity may be circumstantial, and when the amount, kind, and denomination of money correspond and access was proved, as in the case at bar, the identity is sufficiently established.

This court has held many times that it is not its province to determine the weight of evidence and that on questions of fact alone it will not interfere with the judgment of the trial court unless that judgment appears to be manifestly against the weight of evidence. In the case at bar there was evidence to sustain the judgment of the court below.

Affirmed.

RANGEL *et al.* versus FEUILLE *et al.*

No. 132. Argued May 20, 1914. Decided June 27, 1914.

INJUNCTION. APPEAL.

When the circumstances which give rise to the granting of a preliminary injunction by the trial court have, pending appeal, ceased to exist, the same will be dissolved on appeal.

Appeal from the Circuit Court of the Second Judicial Circuit;
Hon. William H. Jackson, Judge.

The facts appear in the opinion.

Frank Feuille, William K. Jackson, and Charles R. Williams,
for appellants. *Hinckley and Ganson,* for appellees.

BROWN, J. This appeal is from an interlocutory decree of the Circuit Court of the Second Judicial Circuit, enjoining the appellants, *pendente lite*, from taking for governmental use certain lands and buildings occupied by and claimed to be owned by the respondents.

It appears that one of the appellants, Frank Feuille, as Head of the Department of Law of the Isthmian Canal Commission, caused the following notice to be served upon the respondents and further caused them to be notified that they would be required to remove or destroy the buildings on their property before January 1, 1914, or such buildings would be destroyed. Said notice reads as follows:

ISTHMIAN CANAL COMMISSION.
DEPARTMENT OF LAW.

N O T I C E.

DECEMBER 9, 1913.

You are hereby notified that it will be necessary for you to remove from this land, and to remove or destroy this building, before January 1, 1914.

It will be necessary for the Isthmian Canal Commission to destroy this building if it is not removed before January 1, 1914.

FRANK FEUILLE,
Head of the Department of Law.

The foregoing notice was given by the appellant, Feuille, it is claimed, in pursuance of the terms of the Executive Order dated December 5, 1913, which order was authorized by the Panama Canal Act of August 24, 1913.

On December 23, 1913, the respondents presented to Hon. W. H. Jackson, Judge of the Second Circuit Court, their bill praying for an injunction against appellants. Thereafter such proceedings were had that on the 31st of January, 1914, the following order and decree was entered of record.

The court hereby grants the motion to vacate and set aside the final judgment and decree granting a permanent injunction and the respondents to the bill are allowed two weeks; that is, until February 14, 1914, in which to answer the allegations thereof.

It is further ordered, adjudged and decreed that the defendants, their servants, agents and employees be enjoined and restrained from seizing, destroying or burning the houses and properties of the plaintiffs, or from in any way interfering with the plaintiffs in the management or ownership of their properties until final judgment and decree in said cause or until the further order of this court. However, with leave to the defendant to move to vacate this injunction when a Joint Commission may be organized for the hearing of claims.

From this decree appeal is brought to this court.

The court below in granting the permanent injunction vacated by the above quoted decree, held, among other things, that real property in the Canal Zone could not be taken by the Government unless there was existing opportunity to present the question of compensation for property so taken to the Joint Commission

created by Article VI of the Treaty between the United States and the Republic of Panama. At the date of the entry of the interlocutory decree no such opportunity existed, for the reason that the American members of the Joint Commission had resigned and the Government of the United States had not appointed their successors. In conformity with his view in this regard, the judge of the court below incorporated both in the original decree which was vacated, and in the decree appealed from, a provision to the effect that the appellants, defendants below, might move to vacate the injunction whenever a Joint Commission should be organized.

In our opinion there could be no arguable basis for the temporary injunction were it not for the fact that at the date of the entry of the decree the Joint Commission was not in existence.

During the argument of the appeal it was admitted by all parties that since the filing of the appeal in this court the President of the United States had appointed two members of the commission and that they were on the Canal Zone ready to join with the Panamanian members in the settlement of disputed claims; and it is a fact of public notoriety that the Joint Commission is now organized and holding regular sessions.

In view of the foregoing it is apparent that the organization of the Joint Commission has rendered unnecessary the consideration of any question of law raised by the appeal. There is left to this court no duty in the premises except formally to dissolve the temporary injunction. Nevertheless, counsel for the appellants have earnestly directed our attention to several propositions of law claimed to be involved in the granting of the injunction and have strongly urged us to express our opinion with respect thereto. Consideration of these propositions would have been important and necessary to a proper disposition of this appeal had not the circumstances changed so radically. Under the existing conditions, however, we can not comply with counsel's request, for any statement of our views regarding the propositions of law referred to would now be merely academic and could have no possible bearing on the settlement of a matter which has already been determined by the course of public events.

It is ordered that the temporary injunction contained in the interlocutory decree appealed from be, and same hereby is, dissolved, and the case remanded to the District Court, Balboa Division, for such further proceedings as may be lawful.

Injunction dissolved.

ANDRADE *versus* SAMUDIO and ARIAS.

No. 138. Argued May 27, 1914. Decided June 27, 1914.

TRESPASS.

One rightfully in possession of realty may maintain an action for trespass *quare clausum fregit* although he may not have title to the land.

The provision of law requiring the owner of rural property to maintain a certain type of fence in order to maintain an action for damages for the trespass of cattle upon his land can not be invoked by a defendant who has driven cattle thereon.

Appeal from the Circuit Court of the Second Judicial Circuit;
Hon. William H. Jackson, Judge.

The facts appear in the opinion.

Fairman, MacIntyre, and Enderton, for appellant. *Hinckley and Ganson and W. H. Carrington*, for appellees.

BROWN, J. The plaintiff appeals to this court from a judgment in favor of the defendants entered in the Circuit Court of the Second Circuit.

The complaint alleged that the plaintiff was the lessee and in the lawful possession, use, and occupation of certain land and the improvements thereon, situated in the Canal Zone and known as the "Banana Field" of the "Hacienda Andrade;" that said tract comprised $5\frac{1}{2}$ hectares of land and there were thereon about 30,000 banana plants belonging to the plaintiff; that the defendants, as copartners, by their agents and employees, had wilfully, wantonly, and maliciously entered upon said tract and cut down and destroyed the banana plants to the damage of plaintiff, etc.

The answers of the defendants contain a general denial.

At the trial much evidence was introduced with respect to the issues raised by the pleadings. It is not our intention, however, in disposing of this appeal, to discuss this evidence in detail. One phase of it only is of much importance to our purpose.

It appears that in August, 1908, the Isthmian Canal Commission, as the agent of the United States of America, took over all the real estate known as the "Hacienda Andrade" after an award of damages had been made to Andrade, the appellant herein, by the Joint Land Commission which was then in session. In January, 1909, the United States, by its agent, the Isthmian Canal

Commission, leased to the appellant by a written instrument a part of this same property which is described in the lease as follows;

Twenty-three (23) hectares (more or less) of growing cane, being a part of the property in the District of Gorgona known as "Hacienda Andrade" and transferred to the United States of America under expropriation proceedings, on or about the 8th day of August, 1908; together with 1 two-story building 47 by 90 feet; one large shed covering distillation plant, 115 by 115 feet; one small outhouse; all machinery, tanks, mills, engines, pumps, and pipe used in connection with the distillation plant and situated on a portion of the Hacienda Andrade above referred to.

Notwithstanding the fact that no banana field is mentioned in the foregoing description it is claimed by appellant that the said banana field was as a matter of fact, embraced within the premises leased and of which appellant was in possession at the time of the acts complained of. There was evidence from which it could have been found, as a fact, by the trial court, that if the banana field were not embraced within the plot leased, the said plot would contain only about $17\frac{1}{2}$ hectares instead of the 23 hectares called for by the terms of the lease. In addition the plot containing the alleged banana field was shown to be on the Gorgona side of the Chagres river and it was testified by Mr. Tom M. Cooke, a witness for the plaintiff, who as Collector of Revenues represented the Isthmian Canal Commission in making land leases, that it was the intention of the Commission to lease back to Andrade everything on the Gorgona side of the Chagres river that had been taken previously by the Commission without any exception whatsoever; that it was not the intention to exclude from the lease any of the property formerly occupied by Andrade on the Gorgona side of the Chagres and that there was a banana field on that side of the river. There was some testimony also to the effect that before the execution of the lease, the Isthmian Canal Commission had placed Andrade in possession as a caretaker of all that part of the "Hacienda Andrade" which was on the Gorgona side of the Chagres.

It was not claimed in the answers that defendants had any title of any sort to the tract of land in question, nor was any evidence offered to that effect.

It is apparent from the foregoing that the appellant's possession of the tract upon which the alleged tortious acts are alleged to have occurred became by the proof, primarily a question of fact. Such possession is fundamental to his right to maintain an action for trespass *quare clausum fregit*.

In his findings, the judge of the court below discussed the evidence at some length, closing such discussion of the facts with these words:

it will therefore be seen that there is a serious dispute as to the facts, first, as to whether there was a banana field to be leased, second, whether there was ever any intention to lease the same; and third, how, or under what circumstances it was destroyed.

Notwithstanding the serious dispute as to the facts, the findings do not contain any determination of the facts. The court below, however, stated that it must hold that the plaintiff could not succeed in his claim that he was the lessee and owner of a banana field of $5\frac{1}{2}$ hectares as alleged in his complaint, because the lease does not contain a reference to that property. In support of this conclusion the trial court invoked the elementary principle that a deed, lease, or agreement of any kind, signed between parties is the final repository of the agreement between said parties, whatever may have been the preliminary negotiations, agreements, and understandings between the parties prior to the execution of the written document, and that, in the absence of fraud, accident, or mutual mistake, parol evidence can not be received to alter, add to, or take away from such final agreement. The court below goes on to suggest that the lease in evidence would have to be corrected by an independent action in equity before the plaintiff could claim that he was, "legally speaking, the lessee or owner" of the property in question.

In making the foregoing conclusion the court below was, in our opinion, in error with respect to the question which is fundamental to the action. The primary question for the trial court to determine was not whether the appellant, plaintiff below, was, "legally speaking, the lessee or owner" of the banana field. The primary question was whether as against alleged tort-feasors the plaintiff was in possession of the banana field. The distinction is vital to the cause before us. Title might prove possession, but legal title is not essential to the possession. Nor was a construction of the lease essential except in so far as a proper construction thereof might throw light on the question of appellant's possession. Moreover, while, as between the parties to a written instrument, the principle referred to by the trial judge is elementary, that principle can not be invoked as a defense by a trespasser who claims no privity with either of the parties to the instrument. Even if there was a dispute between the lessor and the lessee as to what particular property was covered by the lease, defendants

could not wilfully enter upon and destroy property and then defend themselves against suit for damages by acknowledging title to the lessor unless it were shown that the lessor had a lawful right to the possession of the disputed property and that defendants acted under the lessor's orders.

As was well said in an early case in the courts of North Carolina:

Wretched would be the policy which required the title to be shown in every instance where the peaceable possession was disturbed by an intruder who has no right. It would tend to broils and quarrels, and the possessor would resort to force to defend his possession if the law afforded him no redress.

Myrick v. Bishop, 8 N. C. 483.

"No principle is more firmly established" said the court in *Mallette v. White*, 52 Conn. 30, "than that *mere possession* of land, however recent, is a sufficient title to support an action of trespass against one who has not a better right."

(See also cases cited in "Waite's Actions and Defenses.")

(Title "Trespass"; Subheading, "Title in a Third Person".)

Vol. 6, 9. 90.

In the case before us, however, the Government of the United States, the lessor, through its agent, appears to have disclaimed possession of the banana field in question and there is no suggestion that the defendants, while committing the alleged tortious acts were acting under the direction of such lessor.

In view of the foregoing we are of the opinion that the evidence of the witness Cooke and the other evidence referred to and relating to the intention of the parties to the lease should have been considered by the trial court, not as varying the terms of the written lease, concerning which there is no dispute between the parties thereto, but as competent, material, and relevant evidence with respect to the question of the appellant's possession of the banana field.

The respondents have argued that even if the trial court erred in the regard herein pointed out, nevertheless there should be no reversal of the judgment for the reason that appellant could not recover in any event, having failed to fence the alleged banana field in a manner substantially conforming to the laws in force on the Canal Zone at the time of the alleged trespass. The record contains evidence to the effect that employees of the respondents not only cut down bananas on the banana field but that under the direction of the defendants' foreman, drove the defendants' cattle into and upon the banana field, which was partly fenced, and that the cattle destroyed the banana plants. It is, therefore, to be

said that while failure to comply substantially with statutes requiring fencing of property may be established as a defense against a claim for damages for trespass done by straying animals, such failure is not a defense in case of such active, wilful trespass as could be inferred from some of the evidence contained in the record of this case.

We have carefully examined the whole record with a view of rendering final judgment between the parties and so concluding an action which has already been pending in the courts of the Canal Zone for too long a period. But the evidence on the questions at issue is so conflicting that it ought to be passed upon and determined by a trial court and not by an appellate court.

The judgment of the lower court is reversed and a new trial ordered in the District Court of the Canal Zone, Balboa Division, with costs to the appellant to abide the event of the new trial.

Reversed and remanded.

CASES DECIDED WITHOUT OPINION FILED.

No. 51. CRUZ ESTRADA *v.* SERAFIN ACHURRA. Judgment vacated, and case dismissed as per stipulation. September 25, 1909. *Hinckley and Ganson*, for appellant. *W. H. Carrington*, for appellee.

No. 53. CANAL ZONE, *ex rel.*, *v.* HILLERMAN. June 9, 1909. This cause being called comes the respondent in person and files a motion for leave to surrender his license and for striking his name from the roll of attorneys. The motion is allowed and it is ordered that the respondent deliver up his license and certificate for cancellation and that his name be stricken from the list of practicing attorneys. On motion of respondent leave is granted him to act as lawyer in cases in which he is the attorney of record and which are now pending. H. A. GUDGER, C. J.

No. 60. In the matter of MISSION TAVASSA, petition for a writ of habeas corpus, filed October 16, 1909. Petitioner released November 8, 1909. It appearing to the satisfaction of the court that the writ of habeas corpus heretofore issued in this cause has been returned by the acting marshal showing that the petitioner was released upon deposit with the clerk of a bond of \$100. And it now appearing from the petition and from the statements of the Prosecuting Attorney that the said petitioner was unlawfully detained and held in the custody of the acting marshal, it is ordered that the bail be refunded and the said petitioner allowed to go hence without day. H. A. GUDGER, C. J. *E. M. Robinson*, for petitioner.

No. 63. In the matter of WALSH, *et al*, petition for writ of habeas corpus, filed January 17, 1910. Petitioners released January 17, 1910. The court after hearing argument of counsel being fully advised in the premises finds that said petitioners are unlawfully held in the custody of the respondent and it thereupon ordered that the said petitioners WASLH, McDONALD, CHOUQUETTE, and MILLER be and are hereby discharged from the custody of the said respondent. H. A. GUDGER, C. J. *Sam B. Dannis*, for petitioners.

No. 74. CANAL ZONE *v.* FACIO. September 23, 1910, appeal from the Circuit Court of the First Judicial Circuit. November 29, 1910, reversed and remanded.

No. 75. CANAL ZONE *v.* GUTIERREZ and ANGELO. September 23, 1910, appeal from the Circuit Court of the First Judicial Circuit. November 29, 1910, reversed and remanded.

No. 83. LUNA *v.* LEON. May 15, 1911, appeal from the Circuit Court of the Third Judicial Circuit, Hon. Wesley M. Owen, Judge. September 18, 1911, appeal dismissed on motion of appellee. *Carrington* and *Todd*, for appellant. *Hinckley* and *Ganson*, for appellee.

No. 86. CANAL ZONE *v.* YEARWOOD. Appeal from the Circuit Court of the Second Judicial Circuit. Hon. William H. Jackson, Judge. September 18, 1911, dismissed on motion of appellant. *W. H. Carrington*, for appellant. *Charles R. Williams*, for appellee.

No. 89. In the matter of the application of LEONIE BERNARD and MAGGIE DAVID for a writ of habeas corpus. March 20, 1912, dismissed on motion of petitioner. *W. C. McIntyre*, for petitioner. *Charles R. Williams*, for respondent.

No. 91. OWEN *v.* OWEN. Appeal from the Circuit Court of the First Judicial Circuit, Hon. H. A. Gudger, Judge. Affirmed without opinion filed April 15, 1912. *Hinckley* and *Ganson*, for appellant. *W. H. Carrington*, for appellee.

No. 93. JACOBS *v.* CHARLES. June 7, 1912, appeal from the Circuit Court, Second Judicial Circuit. Hon. William H. Jack-

son, Judge. Appeal withdrawn August 5, 1912. *W. H. Carrington*, for appellant. *W. C. MacInyre*, for appellee.

No. 96. *CAPURRO v. BERNADOS Y PADROS*. August 3, 1912, appeal from the Circuit Court, Second Judicial Circuit, Hon. Wesley M. Owen, Judge. Appeal withdrawn October 14, 1912. *Hinckley and Ganson*, for appellant.

No. 102. *CANAL ZONE v. DANIEL MENA*. Application for writ of habeas corpus, November 2, 1912. Writ denied in conformity with opinion as rendered in case number 101, November 11, 1912. *Hinckley and Ganson*, for petitioner. *Frank Feuille*, for respondent.

No. 115. *ANDRADE v. SAMUDIO and ARIAS*. April 14, 1913, appeal from the Circuit Court of the Second Judicial Circuit. Hon. William H. Jackson, Judge. Reversed and remanded by consent, May 14, 1913. *C. P. Fairman*, for appellant. *Hinckley and Ganson* and *W. H. Carrington*, for appellees.

No. 116. *BARKER v. MCCLINTIC MARSHALL CONSTRUCTION COMPANY*. April 14, 1913, appeal from the Circuit Court of the First Judicial Circuit, Hon. H. A. Gudger, Judge. Judgment modified by agreement, June 7, 1913. *Oscar Teran*, for appellant. *W. H. Carrington* and *V. G. De Suze*, for appellee.

No. 124. *WALKER v. THE PANAMA RAILROAD COMPANY*. October 18, 1913, appeal from the Circuit Court of the First Judicial Circuit; Hon. H. A. Gudger, Judge. Appeal withdrawn January 12, 1914. *M. A. Hall*, for appellant. *Charles R. Williams*, for appellee.

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No. 136. In the matter of the estate of GEORGE ANDRADE, deceased. March 28, 1914, appeal from the Circuit Court of the Second Judicial Circuit. Hon. William H. Jackson, Judge. Appeal withdrawn May 27, 1914. *Hinckley* and *Ganson*, for appellant. *Harmodio Arias*, for appellee.

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